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No. 97-372

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether application of the Harbor Maintenance Tax (26 U.S.C. 4461(a)) to goods loaded at ports of the United States for export shipment violates the Export Clause of the Constitution.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-45a) is reported at 114 F.3d 1564. The decision of the United States Court of International Trade (App., *infra*, 46a-89a) is reported at 907 F. Supp. 408.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9, Clause 5 of the Constitution of the United States provides:

> No Tax or Duty shall be laid on Articles exported from any State.

2. 26 U.S.C. 4461 provides:

(a) General rule.—There is hereby imposed a tax on any port use.

(b) Amount of tax.—The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.

(c) Liability and time of imposition of tax.—

(1) Liability.—The tax imposed by subsection (a) shall be paid by —

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) in any other case, the shipper.

(2) Time of imposition.—Except as provided by regulations, the tax imposed by subsection (a) shall be imposed—

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

3. 26 U.S.C. 4462 provides, in relevant part:

(a) Definitions.—For purposes of this subchapter—

(1) Port Use.—The term "port use" means —

(A) the loading of commercial cargo on, or

(B) the unloading of commercial cargo from, a commercial vessel at a port.

(2) Port.—

(A) In general.—The term "port" means any channel or harbor (or component thereof) in the United States, which—

(i) is not an inland waterway, and

(ii) is open to public navigation.

* * * * *

(3) Commercial cargo.—

(A) In general.—The term "commercial cargo" means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.

(B) Certain items not included.—The term "commercial cargo" does not include—

(i) bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or

(ii) fish or other aquatic animal life caught and not previously landed on shore.

* * * * *

STATEMENT

Approximately 4000 cases have been filed in the United States Court of International Trade to challenge the constitutionality of the Harbor Maintenance Tax, 26 U.S.C. 4461. Approximately 90 similar challenges to the tax are pending in the Court of Federal Claims. The present case was selected by the Court of International Trade as a test case for this litigation. The other similar suits have been held in abeyance pending the final disposition of this case.

1. a. The Harbor Maintenance Tax imposes a port use charge of 0.125 percent of the value of any commercial cargo that is loaded or unloaded from a commercial vessel in any port of the United States. 26 U.S.C. 4461(a). The tax applies without differentiation as to the origin or destination of the cargo. The incidence of the tax is simply upon "any port use" (26 U.S.C. 4461(b).

The Harbor Maintenance Tax was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082. That Act was enacted by Congress to provide funds for the necessary costs of maintaining and expanding channel and harbor facilities by "impos[ing] Federal user fees or

charges on the beneficiaries of these expenditures." S. Rep. No. 228, 99th Cong., 1st Sess. 5 (1986). Because the United States "has an obvious interest in making those who specifically benefit from its services pay the cost" (*Massachusetts* v. *United States*, 435 U.S. 444, 462 (1978)), Congress determined to impose a nationally-uniform fee on the "value of the cargo passing" through harbors (S. Rep. No. 126, 99th Cong., 2d Sess. 9 (1985)). The Senate Report on the Act explains that (S. Rep. No. 228, *supra*, at 5-6):

> [T]he ad valorem basis of the charges is the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantage among cargo types and U.S. ports which otherwise might result from user charges.

The Harbor Maintenance Tax is collected from the importer, exporter or other shipper whose cargo is loaded or unloaded in a port of the United States. 26 U.S.C. 4461(c)(1), (2). The charges thus collected are deposited in the Harbor Maintenance Trust Fund (26 U.S.C. 9505)) and "may only be expended for harbor operations and maintenance" costs incurred on the shippers' behalf (App., *infra*, 45a (Mayer, J., dissenting)). See 26 U.S.C. 9505(c).[1] In enacting this

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[1] The Harbor Maintenance Tax was originally established at 0.040 percent of value. Pub. L. No. 99-662, § 4461, 100 Stat. 4266. In the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11214, 104 Stat. 1388-436, it was increased to its current level of 0.125 percent. Before the rate of this port use charge was increased, the Harbor Maintenance Trust Fund provided approximately 40 percent of the necessary funds for the operation and maintenance of eligible channels and harbors. Pub. L. No. 99-662, § 210, 100 Stat. 4106. Since 1991, the Trust

fee, Congress determined that the commercial users who are the principal beneficiaries of the costs incurred in developing and maintaining channels and harbors—rather than the general taxpaying public—should finance the upkeep of these facilities. S. Rep. No. 126, *supra*, at 9.

b. The Harbor Maintenance Tax is collected by the United States Customs Service. Importers remit such payments to the Customs Service along with payments of customs duties. Exporters and domestic shippers, who pay no duties, remit the tax to the Customs Service on a quarterly basis pursuant to 19 C.F.R. 24.24. The monies collected by the Customs Service are then transferred to the Harbor Maintenance Trust Fund pursuant to 26 U.S.C. 9505(b).

2. Respondent loads goods for shipment as exports in ports of the United States and, along with importers and domestic shippers, is therefore subject to the Harbor Maintenance Tax. After making several payments of this port user charge, respondent commenced this refund suit in the United States Court of International Trade. Respondent claimed that application of the Harbor Maintenance Tax to cargo loaded in a port of the United States for export violates the Export Clause of the Constitution, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5.

The Court of International Trade agreed with respondent that the Harbor Maintenance Tax imposes a

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Fund has provided approximately 100 percent of those funds. Water Resources Development Act of 1990, Pub. L. No. 101-640, § 316, 104 Stat. 4641.

prohibited tax on exports (App., *infra*, 46a-89a).[2] The court rejected the government's contention that this statutory fee for "any port use" (26 U.S.C. 4461(a)) is a permissible charge for the use of port facilities. The court stated that "there is little indication that Congress intended to establish a user fee" (App., *infra*, 56a) and that the "primary purpose of the [Har-

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[2] In enacting the Harbor Maintenance Tax, Congress specified that, "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. 4462(f)(2); see *id.* 4462(f)(1). The Senate Report explained that "the Court of International Trade is to have primary jurisdiction for actions involving the port user charge provisions." S. Rep. No. 228, *supra*, at 10. Respondent seeks a refund of payments for which it made a timely administrative protest with the Customs Service pursuant to the provisions applicable to customs duties (19 U.S.C. 1514, 1515). The government acknowledged that the Court of International Trade has jurisdiction in this case, for respondent's claim "contest[s] the denial of a protest" (28 U.S.C. 1581(a)). The Court of International Trade held, however, that, regardless of any protest, the court would have jurisdiction under 28 U.S.C. 1581(i) because respondent's claim was filed in that court within two years after the tax was paid. See App., *infra*, 75a-76a; 28 U.S.C. 2636(i). That holding was affirmed by the Federal Circuit. App., *infra*, 14a.

We do not seek review of that holding in this petition. Whether the jurisdiction of the court rests upon 28 U.S.C. 1581(a)—because respondent seeks review of a denial of a protest—or upon 28 U.S.C. 1581(i)—because this suit was commenced within two years of payment—has no relevance to the proper disposition of this case. That issue is of relevance only for other claimants, who have challenged the Harbor Maintenance Tax without first filing an administrative protest. This jurisdictional issue is, moreover, peculiar to the refund requests of exporters under the Harbor Maintenance Tax and lacks recurring application in other contexts.

bor Maintenance] Tax is to raise revenue" (*id.* at 57a). The court reasoned that "little nexus binds the imposition of the *ad valorem* tax on cargo to the costs of port maintenance" and that the "fees collected * * * yield funds for the purpose of maintaining and developing American ports and harbors for all uses, commercial and recreational" (*id.* at 58a). The court concluded that Congress impermissibly imposed a constitutionally proscribed "duty under the pretext of fixing a fee" (*id.* at 57a, quoting *Pace* v. *Burgess*, 92 U.S. 372, 376 (1876)).

The court assumed, without deciding, that the statutory fee for "any port use" imposed by the Harbor Maintenance Tax (26 U.S.C. 4461(a)) does not discriminate against exports. The court nonetheless concluded that, as applied to goods loaded for export, the tax violates the Export Clause because it is not fairly related to "the cost of the benefits port users receive from harbor maintenance and development projects" (App., *infra*, 60a). The court stated that the port use fee imposed by the Harbor Maintenance Tax has yielded revenues "in excess of costs incurred" in operating and maintaining port facilities and that these funds may be "used to fund projects yet to be commenced, or even envisioned" (*ibid.*). The court reasoned that the charge is therefore "excessive in relation to the cost to the government" of providing port facilities (*ibid.*).

3. a. The Federal Circuit has exclusive jurisdiction over appeals from decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). Sitting as a five-judge panel in this case, the court of appeals affirmed the decision of the court below (App., *infra*, 1a-30a), with one judge dissenting (*id.* at 31a-45a). The court held that the port use fee imposed by the

Harbor Maintenance Tax is unconstitutional as applied to goods loaded for export from the ports of the United States.

The court of appeals noted that, under this Court's decisions in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. 707 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444 (1978), a government fee exacted in connection with the provision of services may constitutionally be applied to goods for export if the fee (i) does not discriminate against exporters, (ii) is based upon a fair approximation of use and (iii) is not excessive in relation to the costs incurred by the government in providing the services (App., *infra*, 17a). Without addressing the first and third prongs of this test, the court concluded that the Harbor Maintenance Tax is unconstitutional as applied to goods for export because "there is no correlation between the amount of [the tax] an exporter pays and the amount the exporter uses the port" (*ibid.*).

The court of appeals gave three reasons for its conclusion. First, the court noted that the tax is imposed on and collected from the party who ships the goods rather than on "the ship owners" who are the "direct users" of the ports and harbors (App., *infra*, 19a). Second, the court stated that, because the statutory port use fee is assessed on the *value* of goods being shipped, it lacks any reasonable connection with the cost or value of the benefits provided from use of the port (*id.* at 21a-22a). Third, the court found it objectionable that "exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use" (*id.* at 22a).

The court rejected the government's contention that a fee based solely upon the use of a port is not a tax on an "[a]rticle of export" within the meaning of the Export Clause. The court reasoned that the fee falls on the goods, and not on the use of the port, because it "is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel" and the "exporter, rather than the manufacturer, pays the tax" (App., *infra*, 24a).

The court also rejected the government's contention that the Harbor Maintenance Tax is not a proscribed tax on exports because it constitutes a valid exercise of the power of Congress to regulate interstate and foreign commerce. The court concluded that the statutory fee on "port use" is not a regulation of commerce because the fee "regulates nothing" (App., *infra*, 27a). The court stated that the Harbor Maintenance Tax does not regulate commerce because "[i]t is not designed to reduce the overall use of the ports" and because "the government has not persuaded us that the [tax] is designed to simply recoup the costs of the services" provided to users of ports and harbors (*ibid.*).

b. Judge Mayer dissented. He noted that a user fee differs from a tax because "a tax is enacted to raise revenue 'to go to the general support of the government,' *see Head Money Cases*, 112 U.S. 580, 596 (1884), while a user fee is designed as a specific charge for the use of government facilities and services" (App., *infra*, 32a). Based upon the text and the extensive legislative history of the statute, Judge Mayer concluded that the Harbor Maintenance Tax is a constitutionally valid fee for the use of harbor facilities that satisfies all three prongs of the test established by this Court in *Massachusetts* v. *United States*, 435 U.S. at 464, 466-470.

First, Judge Mayer disagreed with the majority's conclusion that a fee assessed equally against exporters and all other shippers for the use of the ports of the United States is constitutionally infirm because the parties who must pay the fee are not the "direct beneficiaries" of the services that the government provides. He noted that this conclusion is illogical as a matter of economics and also "flies in the face of Congress' finding that exporters are the direct beneficiaries" of port services (App., *infra*, 42a). Because the ultimate burden of any fee imposed on "port use" is allocated by economics, not by statute, Judge Mayer emphasized that "it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses" (*ibid.*).

Judge Mayer also rejected the majority's conclusion that the Harbor Maintenance Tax is not fairly related to the costs incurred by the government in providing and maintaining port facilities (App., *infra*, 39a-45a). It was expressly to avoid discrimination among ports and port users that Congress chose to allocate the costs of providing these services under a nationally-uniform charge based upon the value of goods shipped (*id.* at 39a). Judge Mayer concluded that the Constitution does not require Congress to calculate the port use fee separately for each port, because "[e]very exporter has all ports and harbors available to it" (*id.* at 40a).

REASONS FOR GRANTING THE PETITION

In holding the Harbor Maintenance Tax unconstitutional as a tax on exports, the Federal Circuit has seriously misapplied the precedents of this Court. Because the Federal Circuit has exclusive jurisdiction over appeals from both the Court of International Trade and the Court of Federal Claims, any appeal from the approximately 4000 pending challenges to the Harbor Maintenance Tax would necessarily be to that circuit. It is therefore unlikely that any other court of appeals will have an opportunity in the future to review this same issue.

The numerous pending cases seek refunds of hundreds of millions of dollars of fees that have been collected to fund the operation and development of the ports of the United States. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal importance. See, *e.g.*, *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is especially appropriate in this case because the Federal Circuit has held an Act of Congress unconstitutional.

1. a. This Court has long recognized the distinction that exists between an unconstitutional "Tax or Duty * * * laid upon Articles exported" (U.S.Const. Art. I, § 9, Cl. 5) and a permissible user fee that exacts "compensation * * * for services properly rendered." *Fairbank* v. *United States*, 181 U.S. 283, 304 (1901), quoting *Pace* v. *Burgess*, 92 U.S. 372, 375 (1875). "[R]evenue measures that operate only to compensate a government for benefits supplied" are

not constitutionally proscribed, for the government "has an obvious interest in making those who specifically benefit from its services pay the cost" (*United States* v. *Massachusetts*, 435 U.S. at 462).[3]

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[3] The court of appeals did not dispute that Congress may properly exercise its power under the Commerce Clause to "recoup the costs of the services" provided to users of ports and harbors (App., *infra*, 27a). A burden upon exports imposed pursuant to a valid exercise of Congress's power to regulate commerce does not violate the Export Clause. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 78-80 (1908). The powers to tax and to regulate commerce are independent sources of legislative authority. See *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 75, 76 (1946); *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 58 (1933). Restrictions applicable to the taxing power are not directly implicated when Congress imposes a fee to recover expenses incurred in promoting commerce. See, *e.g.*, *Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877) (fees assessed for wharf usage were charges for services and not a tax); *New Orleans Steamship Ass'n* v. *Plaquemines Port, Harbor and Terminal Dist.*, 690 F. Supp. 1515, 1522 (E.D. La. 1988) ("charges levied to defray the cost of services that do not hamper, but indeed, aid interstate commerce, have consistently been upheld by the Supreme Court"), aff'd, 874 F.2d 1018 (5th Cir. 1989), cert. denied, 495 U.S. 932 (1990).

That the Harbor Maintenance Tax does not "reduce the overall use of the ports" (App., *infra*, 27a) does not support the conclusion of the court of appeals that the port use fee is not a regulation of commerce. Congress enacted the fee to provide funds to enhance, not reduce, commercial use of port facilities. The Harbor Maintenance Tax was enacted to provide funds "for operations and maintenance of U.S. channels and harbors (ports) in order to improve and maintain such ports for waterborne commerce." S. Rep. No. 228, *supra*, at 5. Congress concluded that "[s]uch additional investment in U.S. ports will facilitate economic development and make the Nation's water transportation system more efficient." *Ibid.* The compulsory contribution that Congress has required from those who benefit

In determining whether a charge imposed on the use of commercial facilities provided by the government constitutes a "tax" within the proscription of the Export Clause or a permissible charge for "services properly rendered," the initial inquiry is whether the primary purpose of the charge is to earn revenue: "The point to guard against is, the imposition of a duty under the pretext of fixing a fee." *Pace* v. *Burgess*, 92 U.S. at 375-376. See also *Fairbank* v. *United States*, 181 U.S. at 304. Enhancement of the general revenue, however, is plainly not an overt or disguised purpose of the Harbor Maintenance Tax.

This statutory fee on "any port use" (26 U.S.C. 4461(a)) was enacted as part of a comprehensive legislative program providing for the operation and development of harbor and port facilities throughout the Nation. As Judge Mayer noted in dissent in this case (App., *infra*, 32a-33a), Congress expressly contemplated that the charges imposed by the Harbor Maintenance Tax represent a user fee, rather than a "tax," in the constitutional sense. See, *e.g.*, S. Rep. No. 228, *supra*, at 5 ("the committee amendment imposes new port user charges"). In imposing this fee on the commercial use of ports of the United States, Congress explained that "[t]he taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and

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from the costs of providing such facilities "is a species of economic regulation that should enjoy the same strong presumption of validity that [is afforded] to other policy judgments made by Congress" (*Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2142 (1997)).

taxes offset services rendered to vessels." S. Rep. No. 126, *supra*, at 7.

Consistent with this clear statement of legislative purpose, the fees collected under this statute are deposited in the specially designated Harbor Maintenance Trust Fund, from which they may be expended only for port and harbor maintenance. 26 U.S.C. 9505(c). These funds may not be used to support the general welfare. See App., *infra*, 36a (Mayer, J., dissenting) ("The government has been true to this constraint.").

The fact that this Trust Fund currently enjoys a positive balance (see note 1, *supra*) does not mean, as the courts below erroneously concluded (App., *infra*, 57a-58a), that the Harbor Maintenance Tax is a disguised and proscribed "tax" rather than a valid "fee" for services. The precise level of funding required each year for the development, maintenance and operation of harbor resources obviously fluctuates over time. As this Court explained in *Massachusetts* v. *United States*, 435 U.S. at 470 n. 25, in rejecting the same contention adopted by the court of appeals in this case:

> Even if the revenues in any one year exceeded the outlays, it would not follow that the tax is invalid as applied. * * * [T]he validity of the tax [is] determined by comparing total revenue with total outlays: *i.e.*, a surplus of revenue over outlays in any one year can be offset against actual deficits of past years and perhaps against projected deficits of future years.

See also *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Authority*, 906 F.2d 516, 522 (11th Cir. 1990) ("given the long term nature of maintaining

and developing an airport, it was appropriate * * * to factor in future development plans when setting user fees."), cert. denied, 498 U.S. 1120 (1991).

The decision of the court of appeals thus seriously misapplies this Court's precedents in concluding that the charges imposed by the Harbor Maintenance Tax represent an unconstitutional "duty" masquerading as a "fee." As the dissent instead correctly emphasizes (App., *infra*, 32a-33a), the relevant fact is that the Trust Fund into which the fees are deposited may not be expended *at any time* for any purpose other than the operation, maintenance and development of harbor and port facilities for commercial navigation. See 26 U.S.C. 9505(c); H.R. Rep. No. 881, 101 Cong., 2d Sess. 288 (1990).

b. The decisions of this Court establish that a user fee does not constitute a proscribed "tax" if the fee (i) does "not discriminate against" a constitutionally protected interest, (ii) is "based upon some fair approximation of use" and (iii) is "not shown to be excessive in relation to the cost to the government of the benefits conferred." *Massachusetts* v. *United States*, 435 U.S. at 464. See also *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. at 716-720. When, as in the present case, the statute was enacted with a "specific declaration by Congress that the [fees collected] are intended to reimburse costs incurred by the United States, the burden must lie with [the plaintiff] to demonstrate that" the fee, in reality, is impermissibly designed to raise general revenues. *United States* v. *Sperry Corp.*, 493 U.S. 52, 60 (1989).

The court of appeals did not conclude that the Harbor Maintenance Tax discriminates against exports. Nor did the court conclude that the fee imposed by the

statute is excessive in relation to the costs of the benefits conferred (App., *infra*, 17a).[4] Instead, the court concluded that the statutory fee is unconstitutional because it is not based upon some "fair approximation of use" of the ports of the United States (*id.* at 23a). Each of the three rationales offered by the court of appeals in support of its conclusion is incorrect and conflicts with decisions of this Court.

(i) The court of appeals stated that the statutory fee is not based upon some "fair approximation of use" because it is imposed on exporters and other parties who ship goods rather than on "the ship owners" who are the "direct users" of the Nation's ports and harbors (App., *infra*, 18a, 19a). The court of appeals provided no citations of authority to support this proposition, however, and no such authority exists.[5]

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[4] The Harbor Maintenance Tax clearly satisfies these two prongs of the test used by this Court in determining whether the exaction is a permissible user fee. The statutory fee applies to all importers, exporters and domestic shippers (26 U.S.C. 4461(c)) and thus does not discriminate against exporters. And, for the reasons described in the text (pages 14-15, *supra*), the fees collected are not excessive in relation to the expenditures made by the government. Although the Trust Fund currently enjoys a positive balance, that fact does not affect the constitutionality of the fee. See, *e.g.*, *Massachusetts* v. *United States*, 435 U.S. at 470 n.25; App., *infra*, 44a (Mayer, J., dissenting). For example, in *New Hampshire Motor Transport Association* v. *Flynn*, 751 F.2d 43, 47 (1st Cir. 1984), the court upheld a user fee even though the monies collected were to be used to fund projects not yet commenced rather than to repay the government for past services rendered.

[5] Respondent argued in the court of appeals that only a "direct beneficiary" of a government program may be subjected to a fee for the costs of that program. Respondent claimed that such a rule was established in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974). That

Indeed, this Court has expressly rejected the very rationale on which the court of appeals relied. In *United States* v. *Sperry Corp.*, 493 U.S. at 60, quoting *Massachusetts* v. *United States*, 435 U.S. at 463 n.19, the Court explained that it:

> has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. * * * All that we have required is that the user fee be a "fair approximation of the cost of benefits suppplied."

In upholding a government fee imposed on the use of airport facilities in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. at 714 (emphasis supplied), the Court emphasized that it is "not * * * particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses. *In either case, it is the act of enplanement and the consequent use of runways and other airport facilities that give rise to the obligation.*"

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decision, however, concerned whether a particular agency fee had been authorized by a particular statute. See *id.* at 342-344. The Court "recognized that it was not announcing universal definitions of 'tax' and 'fee'" but was "simply determining the meaning of these terms in a particular context quite different from that presented in" cases involving the limitations on taxing authority under the Export and Import-Export Clauses. *Union Pacific Railroad Co.* v. *Public Utility Comm'n*, 899 F.2d 854, 861 (9th Cir. 1990). See also *San Juan Cellular Telephone Co.* v. *Public Service Commission of Puerto Rico*, 967 F.2d 683, 687 (1st Cir. 1992); *Maine* v. *Department of Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992); *Florida Power & Light Co.* v. *United States*, 846 F.2d 765 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989).

Here, as in *Evansville*, it is the use of government-provided "facilties that give[s] rise to the obligation" to pay the fee. As Judge Mayer correctly concluded in dissent in this case, because the ultimate burden of any fee imposed on "port use" is allocated by economics, not by statutes, "it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses" (App., *infra*, 42a). The court of appeals improperly ignored the holding of this Court in *Evansville* in reaching its erroneous decision in this case.

The court of appeals similarly erred in ignoring the determination of Congress that it is the exporters and other shippers, and not "the ship owners" (App., *infra*, 19a), who are the "direct beneficiar[ies]" of port maintenance services. Congress enacted the Harbor Maintenance Tax to avoid the harsh consequences that inadequate and deteriorating ports and harbors would have for commercial shippers. S. Rep. No. 126, *supra*, at 8. The fee on "port use" was designed specifically to provide funding to enhance the facilities available for transporting the goods of commercial shippers. In assessing the port use fee against the shippers who use these facilities, Congress rationally concluded that "a portion of Federal expenditures needed for port operations and maintenance should be borne by the direct beneficiaries of such expenditures." S. Rep. No. 228, *supra*, at 5. The court of appeals lacked any plausible basis for rejecting this determination of Congress that the shippers are the "direct beneficiaries of such expenditures" (*ibid.*).

(ii) The court of appeals also erred in holding that the statutory fee on "port use" is not based upon a "fair approximation of use" because it is assessed on the *value* of goods being shipped rather than on tonnage or some other factor (App., *infra*, 21a). That holding conflicts with numerous decisions of this Court.

"This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services." *United States* v. *Sperry Corp.*, 493 U.S. at 60. Recognizing that, "when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system," the Court has specifically "declined to impose a requirement that the Government 'give weight to every factor affecting appropriate compensation.'" *Id.* at 61, quoting *Massachusetts* v. *United States*, 435 U.S. at 468.

For example, flat registration fees that do not vary based upon the amount of use have been sustained if that fee recovers a "fair approximation of the costs of the benefits supplied." *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. at 716-717. Fees for the use of transportation resources based upon the "fair market value" of the vehicle or upon the gross revenues of the transportation service have also been sustained. See *id.* at 715-716; *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Authority*, 906 F.2d at 516.

Mileage or tonnage is not a necessary factor in calculation of a transportation use fee. As the Court emphasized in rejecting the challenge to the flat registration fee assessed in *Massachusetts* v. *United States*, 435 U.S. at 463, quoting *Capitol Greyhound*

Lines v. *Brice*, 339 U.S. 542, 545 (1950), the validity of a use fee "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted." Accord *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. at 716. Even though "[c]omplete fairness" would require that the use fee be calibrated based upon "every factor affecting appropriate compensation" for the government services provided, "[t]hese factors * * * are so countless that we must be content with 'rough approximation rather than precision.'" *Capitol Greyhound Lines* v. *Brice*, 339 U.S. at 545, quoting *International Harvester Co.* v. *Evatt*, 329 U.S. 416, 422-423 (1947).

The statutory fee for port use satisfies the requirement that it not "be unreasonable in amount for the privilege granted." The funds obtained through collection of the fee recover the costs incurred in providing port services (pages 14-15, *supra*), and the fee is imposed on the parties whose goods are enhanced in value by these services. A recovery of a portion of the value of the benefits conferred—from those who receive that value—is not "unreasonable in amount for the privilege granted." In holding to the contrary in this case, the court of appeals failed to adhere to this Court's consistent admonition that the validity of the fee is to be "judged by its result, not its formula."

The Court has often emphasized that perfection in the allocation of costs among those who benefit is not required. For more than a century, the Court has recognized that "[p]erfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream." *Head Money Cases*, 112 U.S. 580, 595 (1884). It is therefore "the amount of the tax, not its formula, that is of

central concern." *Evansville Airport Authority District* v. *Delta Airlines*, 405 U.S. at 716-717. In *United States* v. *Sperry Corp.*, 493 U.S. at 60, for example, the Court upheld a federal fee imposed for use of the Iran Claims Tribunal that was based solely on the value of the recovery. In upholding that *ad valorem* fee, the Court specifically rejected the notion "that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services." *Ibid.* It is thus "beyond dispute that an ad valorem charge can be a user fee" (App., *infra*, 41a (Mayer, J., dissenting), citing, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. at 59-64; *Alamo Rent-A-Car, Inc.* v. *City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992)).

Congress reasonably concluded that an *ad valorem* fee was appropriate in the present context as well. Such a formula reasonably charges the costs of port operations to those who benefit from actual use of the ports. Moreover, allocating costs based upon the value of the goods being shipped substantially reduces administrative costs and burdens.[6] Congress was aware that the Customs Service "has a strong presence at ports of entry and is experienced at appraising imported merchandise." S. Rep. No. 228, *supra*, at 10. Because the core information collected by the Customs Service concerns the value of the cargo, structuring the Harbor Maintenance Tax on an *ad valorem* basis reduces administrative costs by utilizing

[6] The Court noted in *Massachusetts* v. *United States*, 435 U.S. at 466 that, "[i]f the National Government were required more precisely to calibrate the amount of the fee to the extent of the actual use of the airways, administrative costs would increase and so would the amount of revenue needed to operate the system."

the existing data collection system. Extensive testimony was presented to Congress favoring such an *ad valorem* fee over a port-specific fee or a flat tonnage fee. See, *e.g.*, *User Fees for Ports and Waterways: Hearing Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. 47 (1985) (*Senate Hearing*); *Water Resource Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing Before the House Comm. on Ways and Means*, 99th Cong., 1st Sess. 59 (1985) (*House Hearing*). Shippers of low-value cargo testified that any fee for port use that was calculated upon tonnage would "disproportionately * * * affect bulk cargo marketability when compared to [its] impact on containerized cargo. It also would disadvantage export dependent ports in contrast to import dependent ports." *Senate Hearing*, *supra*, at 19; see *House Hearing*, *supra*, at 59. In imposing the statutory fee on an *ad valorem* basis, Congress rationally concluded that shippers of higher value cargo would receive greater benefits (*e.g.*, greater profits) from the enhancement of port facilities and that value is therefore "the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." S. Rep. No. 228, *supra*, at 5-6.

In overruling the method of "fair approximation" that Congress reasonably elected to employ in imposing this fee for port use, the court of appeals thus disregarded not only the decisions of this Court but also the clear legislative record. In particular, the court failed to follow the well-established rule, summarized by this Court in *Fairbank* v. *United States*,

181 U.S. at 304, quoting *Pace* v. *Burgess*, 92 U.S. at 375-376, that:

> proper fees * * * are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. * * * [H]aving due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive or that it amounts to an infringement of the constitutional provision * * * .

(iii) The court of appeals further erred in concluding that the statutory port use fee is objectionable because "exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use" (App., *infra*, 22a). This Court rejected an identical contention in sustaining a federal fee for airport services in *Massachusetts* v. *United States*, 435 U.S. at 468. The Court explained that, even though a user may actually land or take off from only a limited number of facilities, charging a nationally-uniform fee that contributes to a national fund for airport services is permissible because nationwide "services are available for their use if needed and * * * the provision of the services makes the airways safer for all users." *Ibid.* (footnote omitted) See also *Maine* v. *Department of Navy*, 973 F.2d at 1013-1014 (upholding a state fee as a "fair approximation" of the use of state

services when the parties benefit from the availability of the services as well as from any actual use). The decision of the court of appeals in this case conflicts with this settled rule.

2. Several thousand cases pending in the Court of International Trade and the Court of Federal Claims raise the same question presented in this case. The fees imposed by the Harbor Maintenance Tax involved in these cases exceed several hundred million dollars. Any appeal from judgments rendered in these cases will lie exclusively to the Federal Circuit. 28 U.S.C. 1295(a)(3), (5). It is therefore unlikely that any other court of appeals will have an opportunity to review the issue decided in this case.

In similar contexts, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal importance. See, *e.g.*, *United States* v. *Hill*, 506 U.S. at 549; cases cited page 12, *supra*. Such review is particularly appropriate when, as in the present case, the Federal Circuit has failed to follow the decisions of this Court in improperly declaring an Act of Congress unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 96-1210

UNITED STATES SHOE CORPORATION,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

Decided: June 3, 1997

Before: MAYER, MICHEL, RADER, and BRYSON, *Circuit Judges*, and SMITH, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* MICHEL. Dissenting opinion filed by *Circuit Judge* MAYER.

MICHEL, *Circuit Judge*.

The United States ("the government") appeals from the December 4, 1995 decision of the United States Court of International Trade granting summary judgment to United States Shoe Corporation ("US Shoe") and holding that the court possessed jurisdiction over this case pursuant to 28 U.S.C. § 1581(i), not 28 U.S.C. § 1581(a), that the Harbor Maintenance Tax ("HMT") violates the United States Constitution and is therefore void as applied to exports. *See United States Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). The case was submitted for our

decision after oral argument by the parties before a five-judge panel on February 7, 1997, following briefing not only by the parties but also by numerous amici. The Court of International Trade correctly exercised jurisdiction under 28 U.S.C. § 1581(i) and correctly concluded that the HMT violates the Export Clause, U.S. Const., Art. 1, § 9, cl. 5, because it is a tax on exports rather than a user fee. The HMT, as applied to exports, is not a user fee but rather a tax because it is paid by the exporter, not the direct user of the harbor, and is calculated solely based on the value of the cargo loaded for export and bears no reasonable relationship to the cost of the use of the port facilities maintained by the government and therefore cannot be a fair approximation of use. We therefore affirm the judgment invalidating the HMT as applied to exports and ordering a refund to U.S. Shoe.

BACKGROUND

The HMT was imposed by Congress as part of the Comprehensive Water Resources Development Act of 1986 ("the Act"), Pub. L. No. 96-622, 100 Stat. 4082 (codified at 26 U.S.C. § 4461). The Act also established the Harbor Maintenance Trust Fund ("the Trust Fund") to provide for the operation and maintenance of channels and harbors. The details of the HMT, the Act, and the Trust Fund relevant to this lawsuit are set forth in the trial court's opinion and are not repeated here in detail. *See United States Shoe*, 907 F. Supp. at 411-12.

In short, the Act imposes an *ad valorem* tax of 0.125 percent of the value of the commercial cargo involved in "any port use" of federally maintained navigable waterways. 26 U.S.C. §§ 4461, 4462(a)(2) (1994).

The HMT is imposed on both exports and imports. As it specifically applies to exports, the HMT statute provides:

> (a) General rule.—There is hereby imposed a tax on any port use.
>
> (b) Amount of tax.—The amount of tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
>
> (c) Liability and time of imposition of tax.—
>
> (1) Liability.—The tax imposed by subsection (a) shall be paid by—
>
> . . .
>
> (B) in the case of cargo to be exported from the United States, the exporter....
>
> (2) Time of imposition.—Except as provided by regulations, *the tax imposed by subsection (a) shall be imposed—*
>
> (A) *in the case of cargo to be exported from the United States, at the time of loading.* ...

26 U.S.C. § 4461 (1994) (emphasis added). The term "port use" is defined as "the loading of commercial cargo on, or ... the unloading of commercial cargo from, a commercial vessel at a port." 26 U.S.C. § 4462(a)(1) (1994). The term "port" is defined as "any channel or harbor (or component thereof) in the United States, which ... (i) is not an inland waterway, and (ii) is open to public navigation." 26 U.S.C.

§ 4462(a)(2)(A) (1994). The term "commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire," but does not include "bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or ... fish or other aquatic animal life caught and not previously landed on shore." 26 U.S.C. § 4462(a)(3) (1994). Thus, although there are certain exemptions, the tax is generally imposed against all imports, exports, domestic shipments, and passengers. *See* 26 U.S.C. §§ 4461(c)(1), 4462(a)(3)(A) (1994).[1] Money collected pursuant to the Act is transferred by Customs to the Trust Fund for disbursal upon further appropriation by Congress. *See* 26 U.S.C. § 9505(b) (1994). The fees were designed to finance the cost of harbor dredging. *See* S. Rep. No. 99-126 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647. By the end of fiscal year 1994, the total amount of fees collected and deposited in the Trust Fund was over 2.7 billion dollars, of which over 700 million dollars was paid by exporters.

Although the HMT was first enacted in 1986, there were no constitutional challenges until recently. US Shoe paid the HMT on articles exported for the period April 1 through June 30, 1994. US Shoe then brought suit in the Court of International Trade for the refund of these payments on the ground that the HMT, as applied to exports, is unconstitutional. In January 1995, given the large number of pending lawsuits

[1] For passengers the tax is calculated based on the charge assessed for transportation. *See* 26 U.S.C. § 4462(a)(5)(B) (1994).

challenging the constitutionality of the HMT,[2] the Court of International Trade established a three-judge panel and heard this case as a test case. *See* 28 U.S.C. § 255 (1994) (authorizing the chief judge of the Court of International Trade to designate a three-judge panel to hear cases raising the constitutionality of any Act of Congress or which have broad or significant implications in the administration or interpretation of customs laws).

The parties filed cross-motions for summary judgment and, on October 25, 1995, the trial court issued its decision granting U.S. Shoe's motion for summary judgment. *United States Shoe*, 907 F. Supp. at 408. The trial court first concluded that the HMT was unconstitutional as applied to exports because it constituted a tax, rather than a user fee, as it did not have regulation as its primary purpose and it did not recoup the costs of services provided to the payor. *Id.* at 413-18. Specifically, the trial court noted that "the Act neither discourages nor regulates use of a harbor; neither does it so intend." *Id.* at 413. The trial court also found that "the primary purpose of the [HMT] is to raise revenue, as Congress has imposed 'a duty under the pretext of fixing a fee.'" *Id.* at 414 (citation omitted). The trial court further determined that jurisdiction was not properly based on 28 U.S.C. § 1581(a), because there was no decision of Customs to protest. *Id.* at 418- 21. In part, the trial court relied

[2] As of the summer of 1996, there were approximately 2400 complaints pending in the Court of International Trade, as well as approximately 40 complaints pending before the Court of Federal Claims and one complaint pending in district court. The great majority of these lawsuits have been stayed pending the outcome of this appeal.

on the fact that "Customs does not determine the application, policies, or rates of the [HMT], but merely serves to implement its provisions." *Id.* at 420. Rather, the trial court held jurisdiction was properly based on 28 U.S.C. § 1581(i) because Congress directed that the HMT be treated as a customs duty and because customs duties, by their very nature, provide for revenue from imports. *Id.* at 421. The Court of International Trade enjoined the government from assessing and collecting the HMT and ordered the parties to file a proposed judgment.

The government appealed, urging that we hold that jurisdiction over these disputes is only proper pursuant to 28 U.S.C. § 1581(a) and that the HMT is constitutional. We heard this case as a five-judge panel pursuant to Local Rule 47.2, which states that "appeals in cases from the Court of International Trade decided by a three-judge court pursuant to 28 U.S.C. § 255 will ordinarily be referred to a panel of five judges." Fed. Cir. R. 47.2.

ANALYSIS

We "review the summary judgment in this case 'for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist.'" *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993) (quoting *Guess? Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991)). Here, the parties do not dispute any facts, but only dispute questions of law relating to the proper interpretation of the jurisdictional statutes and the constitutionality of the HMT as applied to exports.

I.

The parties do not dispute that the Court of International Trade possesses exclusive jurisdiction over this type of matter seeking a refund of HMT pursuant to 28 U.S.C. § 1581, in light of Congress' provision that "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2) (1994). The only dispute is whether subsection (a) or subsection (i) of section 1581 applies. The dispute exists because subsection (a) requires that the exporter first file a protest and limits recovery to amounts protested within 90 days of payment, while subsection (i) states only that the action must be initiated within two years of the date on which the cause of action accrued.

The relevant statutory subsections provide as follows:

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.
>
> * * * * *
>
> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subjection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies,

or its officers, that arises out of any law of the United States providing for -

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section. ....

28 U.S.C. § 1581 (1994).

A.

Although admitting that it does not fit perfectly, the government argues that subsection 1581(a) nevertheless confers jurisdiction over this dispute. The government argues section 1581(a) is the "established route" for obtaining judicial review of duties, charges, and exactions imposed by Congress. As Congress envisioned that the HMT would be treat ed like a duty, the government argues jurisdiction under this subsection is the only logical result. The government admits, as it must, that subsection (a) requires that prior to the time an exporter can seek judicial review, Customs must issue a decision, the decision must be protested, and the protest must be denied. *See* 19 U.S.C. §§ 1514 (stating that decisions of the Customs Service are final unless a protest is filed), 1515

(stating that all protests will be reviewed within two years of filing). The government argues that the relevant "decision" is Customs' acceptance of the exporter's payment. In support, the government points to a generic regulation suggesting that the date of exaction (the date of payment) constitutes a protestable event. *See* 19 C.F.R. § 174.12(e) (1996) ("Protests shall be filed ... within 90 days after ... [t]he date of the decision, involving neither a liquidation nor reliquidation, as to which the protest is made (e.g., the date of an exaction. ...")). According to the government, this regulation eliminates any confusion regarding the availability, timing or other procedures applicable to a protest and over 1000 HMT protests have been received by Customs pursuant to this regulation.

Relying on legislative history, U.S. Shoe responds that Congress directed that the HMT be treated like a duty so that the Court of International Trade, with its expertise in international trade matters, would have jurisdiction over any disputes and so as to facilitate Customs' collection and processing of the HMT. *See* H. Rep. No. 99-228 at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714-15 ("In order to facilitate administration and collection of the port user charges [i.e., the HMT] by the U.S. Customs Service, ... all administrative and enforcement provisions ... are to apply ... as if such charges were customs duties."). Thus, according to U.S. Shoe, it is not clear that Congress intended for jurisdiction over this type of dispute to fall within a particular subsection of section 1581, and there is no evidence that Congress intended to amend the requirement of 19 U.S.C. § 1514 that there must be a Customs "decision" before filing a protest. US Shoe further argues that acceptance of

payment is not a protestable decision and that therefore subsection (a) cannot apply.

We find US Shoe's arguments persuasive. Subsection (a) is not directly applicable because it applies to suits commenced to contest the denial of a protest. Decisions of the Customs Service are final unless a protest is filed. 19 U.S.C. § 1514(a) (1994). Decisions can refer to, for example, "the classification and rate and amount of duties chargeable" or "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." *Id.* While the HMT is likely a charge or exaction, we do not believe that the actual payment or receipt of the HMT can be a "decision" of Customs, as Customs has not made any decision—it merely passively collects money in the amount required by the statute. Customs doesn't even notify exporters of the need to pay the HMT; rather, the exporter pays all accumulated fees on a quarterly basis by simply mailing a check or money order to Customs along with appropriate forms. *See* 19 C.F.R. § 24.24(e)(2)(ii) (1996).

Typically, "decisions" of Customs are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty. Indeed, prior case law indicates that Customs must engage in some sort of decision-making process in order for there to be a protestable decision. Thus, for example, in *Dart Export Corp. v. United States*, 43 C.C.P.A. 64 (1956), one of our predecessor courts held that Customs' acceptance of estimated duties paid by an importer upon entry did not constitute a final, protestable decision which would deprive the government of the right to liquidate the entry at a later date, because the payment was based entirely on information provided

by the importer, rather than after analysis and adjudication by Customs. *Id.* at 69-70, 74. Likewise, here, the HMT is based entirely on the exporter's information and calculation. *See* 19 C.F.R. § 24.24(e)(2)(i) (1996). Specifically, this regulation provides that:

> [W]hen cargo is loaded on a commercial vessel for export at a port within the definition of this section, the exporter of that cargo (the name that appears on the SED or equivalent document authorized under 15 CFR 30.39(b)) is liable for the payment of the port use fee at the time of loading. The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation.

Id. Thus, Customs merely passively collects payments calculated by the exporters pursuant to statutes and regulations and performs no active role whatsoever. It performs no analysis; it issues no directives or decisions; it imposes no liabilities.

Similarly, in *Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994), this court held that the Court of International Trade lacked jurisdiction over Mitsubishi's complaint under section 1581(a) because the Customs Service did not make any antidumping "decisions" as Customs merely followed the Department of Commerce's instructions in assessing and collecting specified duties. *Id.* at 977. The court pointed out that Customs' role was merely ministerial and that Customs did not determine the rate or amount of the antidumping duties. *Id.* Commerce actually conducted the antidumping duty investigation, calculated the antidumping duties, and issued the antidumping order; Customs merely collected the estimated duties. *Id.* at 976. Likewise, here, there

was nothing for Customs to decide, because all substantive particulars regarding the imposition and amount of HMT are established by Congress. The amount of the HMT (0.125 percent of the value of the commercial cargo) is set by statute, 26 U.S.C. § 4461, and the exporter performs the calculation, 19 C.F.R. § 24.24. Customs is merely collecting the HMT in the amount and manner specified by Congress. Thus, there is simply no decision that U.S. Shoe could have protested, or should have been required to protest, in order to allow the Court of International Trade to hear this dispute.

Norfolk & W. Ry. v. United States, 843 F.Supp. 728 (Ct. Int'l Trade 1994), *aff'd*, 62 F.3d 1395 (Fed. Cir. 1995), relied on by the government, is not to the contrary. There, a railroad company brought an action challenging user fees collected on vehicles and vessels entering the United States. *Id.* at 729. The railroad company filed a user fee refund request with the Secretary of the Treasury on the grounds that its railroad barges were not ferries and that, as barges, they were subject to a cap on user fees. *Id.* at 730. The refund request was granted. However, several years later, Customs informed the railroad company that its barges were indeed ferries and not subject to the cap. *Id.* The court concluded that the user fees were charges subject to protest and that jurisdiction fell under 1581(a). *Id.* at 732-33 ("The user fees at issue in this case are clearly 'charges' within the meaning of § 1514(a) and, therefore, are subject to protest under this subsection."). A careful reading of this case, however, makes clear that the user fees were protestable charges because there had been a specific decision by Customs applying statutory definitions that certain vessels were ferries rather than

barges, thus subjecting the cargo to user fees. *Id.* at 730, 733. There, Customs was authorized to collect certain user fees on vehicles and vessels entering the United States. *Id.* at 729. The Railway transported railroad cars on barges into the United States from Canada. *Id.* The amount of fees due varied based on whether the barge was considered a ferry or not. The Railway was notified by Customs that it was required to pay a $7.50 user fee for each of the railroad cars, but no fees for its barges because Customs considered the barges to be ferries. *Id.* at 730. The Railway filed a protest of that decision. There is no comparable analysis and decision here. This is not a case where, for example, U.S. Shoe contended its exports fell within one of the HMT exemptions and Customs decided to the contrary.

We therefore hold that because the collection of the HMT does not involve a protestable decision on the part of Customs, the trial court correctly concluded that jurisdiction over this dispute did not arise under 28 U.S.C. § 1581(a). In light of this holding, we need not reach U.S. Shoe's additional arguments that any protest it might have filed would have been futile or manifestly inadequate.

B.

Given that the Court of International Trade did not possess jurisdiction under 28 U.S.C. § 1581(a), if it possessed jurisdiction over this dispute, as the government concedes that it did, it can only have been pursuant to the default provision, 28 U.S.C. § 1581(i). The government argues subsection 1581(i) cannot apply because that subsection provides for jurisdiction in only those limited circumstances when jurisdiction under any of the other subsections is unavail-

able or manifestly inadequate. However, this is no bar to jurisdiction here because jurisdiction under the other subsections, specifically subsection (a)—the only other arguable possibility—is unavailable. The government also argues that, by its own terms, subsection 1581(i) applies only to imports, not to exports.

We do not agree. As U.S. Shoe persuasively argues, the Court of International Trade properly exercised its jurisdiction under 28 U.S.C. § 1581(i). Congress expressly directed that for jurisdictional, administrative and enforcement purposes, the HMT was deemed to be a customs duty. Thus, it is beyond dispute that Congress intended the Court of International Trade to have jurisdiction over disputes regarding the HMT, as the Court of International Trade has exclusive jurisdiction over customs matters. Moreover, there is no argument made by either U.S. Shoe or the government that the Court of International Trade can exercise jurisdiction over this dispute pursuant to any statute other than 28 U.S.C. § 1581. As discussed above, subsection 1581(a) does not apply. The only other credible, and indeed the only other argued, possibility is subsection 1581(i). Admittedly, subsection (i) does not specifically refer to disputes concerning the constitutionality of fees such as the HMT. It does, however, specifically refer to the "administration and enforcement with respect to the matters referred to in" the preceding paragraphs, including any law providing for revenue from imports. This dispute does involve the "administration and enforcement" of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports. Additionally, the mere fact that subsection 1581(i) does not speak precisely to this issue and does not use the word

"exports" is not dispositive, as it "was intended to give the Court of International Trade *broad residual authority* over civil actions arising out of federal statutes governing import transactions. ..." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994) (emphasis added).

Thus, in light of the fact that the HMT is a law providing for revenue from imports (as well as exports) and the fact that subsection 1581(i) grants broad residual authority concerning import transactions to the Court of International Trade, the trial court properly asserted jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(i). We must therefore consider whether the trial court correctly held that the HMT, as applied to exports, is unconstitutional.[3]

II.

The United States Constitution provides that:

> No Tax or Duty shall be laid on articles exported from any State.

U.S. Const., Art. I, § 9, cl. 5. The Supreme Court recently analyzed the Export Clause in *United States v. International Bus. Mach.*, — U.S. ——, 116 S.Ct. 1793 (1996). There, the Supreme Court held that the Export Clause does not permit "the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit." *IBM*, 116 S.Ct. at 1795. In other words, even those taxes that are imposed equally on exports and imports or other articles of commerce are prohibited by the Export Clause. *See Id.* at 1803. ("The better reading [of the Export

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[3] We need not and do not address the constitutionality of the HMT statute as applied to anything except exports.

Clause], that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by *completely* denying to Congress the power to tax exports at all.") (emphasis added). Thus, if the HMT is a tax on goods in export transit, it is invalid. We address first whether the HMT is a tax and second whether the HMT is imposed on goods in export transit.

A.

The HMT statute provides:

> (a) General rule.—There is hereby imposed a *tax* on any port use.
>
> (b) Amount of *tax*.—The amount of *tax* imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
>
> (c) Liability and time of imposition of *tax*.—
>
> (1) Liability.—The *tax* imposed by subsection (a) shall be paid by—
>
> ....
>
> (B) in the case of cargo to be exported from the United States, the exporter....
>
> (2) Time of imposition.—Except as provided by regulations, the *tax* imposed by subsection (a) shall be imposed—
>
> (A) in the case of cargo to be exported from the United States, at the time of loading....

26 U.S.C. § 4461 (1994) (emphasis added). Thus, this statute, at least as it applies to exports, appears to be a prohibited tax on exports in that the tax is imposed based on the value of the exported goods and accrues at the time the goods are loaded on a ship for export. Although the legislative history refers to the HMT as a user fee, the statute itself repeatedly refers to the HMT as a tax and is codified in the Internal Revenue Code.

The government, however, argues that the fact that the HMT is referred to as a tax is not dispositive and that the HMT is actually a user fee, not a tax. The test used to distinguish between taxes and user fees was first articulated in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972), and more recently applied in *Massachusetts v. United States*, 435 U.S. 444 (1978). That test states that user fees are valid as such so long as they: (1) do not discriminate against the constitutionally protected interest (here, exports); (2) are based on a fair approximation of use; and (3) are not excessive in relation to the cost to the government of the conferred benefits. *See Massachusetts*, 435 U.S. at 464. We need not decide whether the HMT discriminates against exports or is excessive in relation to the cost to the government of the conferred benefits. Instead, we discuss only whether the HMT is based on a fair approximation of use.

US Shoe argues, and the trial court held, that the HMT is not a fair approximation of the cost of the benefits received by exporters because there is no correlation between the amount of HMT an exporter pays and the amount the exporter uses the port. In other words, the amount of the HMT has no relationship to the size or weight of the vessel or the neces-

sary depth of the port required by the vessel. For example, "[l]ow value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters." *U.S. Shoe*, 907 F. Supp. at 415. Yet, even though the bulk cargo exporters generally require a larger vessel and a deeper port, and therefore "use" the port to a greater extent, they pay a lower tax than high value, low bulk cargo exporters. Moreover, a ship that docks but does not load or unload cargo is not required to pay a fee, even though that ship otherwise utilizes the port. Additionally, there is apparently no correlation between the amount of fees collected at a particular port and the expenditure of funds from the Trust Fund to maintain that particular port. Indeed the trial court found that "most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures." *Id.* Finally, it is not consistent with a true user fee that so many users are exempted, such as those carrying bunker fuel, ship's stores, equipment necessary for the operation of the vessel and fish and other aquatic animal life not previously landed on shore, 26 U.S.C. § 4462(a) (1994), since ships carrying these products use the port facilities to the same extent as ships carrying products subject to the HMT.

The government argues that the HMT is based on a fair approximation of use and, in support, relies on other cases in which similar *ad valorem* user fees have been upheld. The government first relies on *United States v. Sperry Corp.*, 493 U.S. 52 (1989), where the Supreme Court held that a user fee of 1.5% of all awards recovered from the Iran-United States Claims Tribunal was not an unconstitutional taking but a valid user fee. There, Sperry had argued that

the fee could not be a user fee because it did not bear any relationship to the cost of the tribunal to the United States or the value of the tribunal to Sperry. *Id.* at 60. In rejecting this argument, the Court stated that a user fee need not be "precisely calibrated to the use that a party makes of government services" and need only be a "fair approximation." *Id.* The Court also recognized that, where user fees are applied to a large number of parties, some users will be charged more and some less than in a perfect user-fee system. *Id.* at 61. Here, the government argues that, as in *Sperry*, the fact that the benefits received do not exactly correspond to the amount of the HMT does not render the HMT statute unconstitutional.

We do not find *Sperry* dispositive for two reasons. First, unlike the present case, in *Sperry* the person receiving the award and paying the fee was the direct beneficiary of the process for which they were paying. In other words, parties that had their claims adjudicated by the tribunal or otherwise received the benefit of the tribunal were required to pay the costs of establishing and maintaining the tribunal. Here, on the other hand, as applied to exports, the direct users—the ship owners—do not contribute to the maintenance of the port and it is only indirect users—the export companies—that are required to pay the HMT. Second, the *Sperry* Court, in distinguishing a case holding registration and axle taxes unconstitutional as a violation of the Commerce Clause, stated that the standard applied under the Just Compensation Clause was less strict than that which would be applied in a Commerce Clause analysis where one is concerned about discrimination against interstate commerce. *Id.* at 61 n.7. To this we would add that,

per *IBM*, the Export Clause is still more restrictive. *See IBM*, 116 S. Ct. at 1799 ("Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the Export Clause is equally fluid. At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.") (footnote omitted).

The government also relies on *Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir.1990), where the Eleventh Circuit concluded that an airport access fee enacted to provide funds to maintain the airport and based on a rental car company's gross business receipts was a valid user fee. Alamo argued the fee was not a fair approximation because it bore no relation to Alamo's use of the airport and instead varied in proportion to the revenue generated by Alamo's customers. *Id.* at 520. Alamo argued that its only use of the airport was to drive on the airport roads to pick up customers and that its fee should be limited to a pro rata road use fee. *Id.* at 519. The court disagreed, reasoning as follows:

> Although imprecise in particular applications, the Authority's decision to measure Alamo's use of the airport facility by the gross receipts generated from Alamo's airport customers is not irrational. The Authority could reasonably conclude that the ten percent fee on average represents Alamo's use of the airport facility. It stands to reason that *in general* the more money Alamo makes from airport passengers, the more trips Alamo has made to the airport.

Id. at 520 (emphasis added). Thus, while imprecise, the fee was not unfair or irrational, but was instead a "fair approximation." Again, the payer of the fee in *Alamo* was the direct beneficiary of the use of the airport, unlike here where the exporter is not the direct beneficiary and is not assured harbor maintenance at the harbor where the exporter's goods are loaded. Moreover, in rejecting Alamo's argument that the fee was unreasonable because it was required to pay a greater fee for a person who rented a car for seven days than for a person who only rented a car for one day even though each individual made equal use of the airport, there the court found that the 10% fee was acceptable because it represented, on average, Alamo's use of the airport. *Id.* Here, there is no such finding that the HMT represents, on average, an exporter's use of the port and, as discussed above, the court concluded that the HMT was not based on a fair approximation of use, thereby implicitly finding that the HMT did not represent, on average, an exporter's use of the port.

The government also argues, without providing any support, that by using the words "fair approximation of use" the Supreme Court in *Massachusetts* intended to refer to the *value* of the benefits received, rather than the *costs* of the benefits received. The government then asserts that the HMT is a fair approximation of the value of the benefits received because the profitability of higher value cargo is higher than for lower value cargo. We do not agree. First, the *Massachusetts* case itself suggests that the cost of the benefits, rather than the value, is the appropriate

measure in its statements that "Congress believed that four measures, taken together, would fairly reflect some of the *cost* of the benefits" and "the present scheme nevertheless is a fair approximation of the *costs* of the benefits each aircraft receives." 435 U.S. at 468 (emphasis added). Second, higher value merchandise does not always correlate to a higher profit margin and the government has failed to present any facts that would suggest that, even on average, this is the case. Thus, exporters of higher value goods do not necessarily receive a greater benefit, even in terms of value, than exporters of lower value goods. Third, the exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use. Fourth, the HMT does not pay for services, such as police, fire or rescue units, that provide benefits to the exporters by keeping the harbors safe whether the exporters use those services or not. *See Maine v. Department of Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992) (refusing to grant summary judgment that fee used to pay for a hazardous waste spill response team was not based on a fair approximation of use because, even though the Navy had not yet needed the team, it was available to minimize any future spill at the shipyard).[4] Therefore, even if the value of the benefits received is an accurate measure, we hold that the HMT is not a fair approximation of the value of the benefits received by the exporters.

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[4] Notably, in this case the appellate court rejected the Navy's argument that the measure of the authorized fee for services is the value to the recipient. *See Maine*, 973 F.2d at 1014.

We therefore hold that the HMT is not based on a fair approximation of use and, as such, is not a permissible user fee. Although the decision to impose the HMT on an *ad valorem* basis may have substantially reduced administrative costs and burdens, it is nevertheless not based on a fair approximation of use. Since the HMT is not a valid user fee, it must be a tax.

B.

The government also argues the HMT is not levied against exported articles and, therefore, even if it is a tax, it is not unconstitutional. Rather, according to the government, the fee is imposed on the use of federally maintained harbors by shippers,[5] exporters[6] and importers[7] of commercial cargo, regardless of destination, and is even imposed on the transportation of passengers. Thus, according to the government, the HMT is "an ordinary burden of taxation" rather than a tax or duty imposed on "exported articles."

We do not agree. The Constitution prohibits taxation of articles in the course of being exported. *See A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69 (1923) ("The fact that the law under which the tax was imposed was a general law touching all sales of the

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[5] Shippers, i.e., the persons or corporations that pay the freight, are responsible for paying the HMT on commercial shipments within the United States. *See* 19 C.F.R. § 24.24(e)(1)(i) (1996).

[6] Exporters, i.e., the persons or corporations whose name appears on the SED document or the equivalent document, are liable for the HMT on exports. *See* 19 C.F.R. § 24.24(e)(2)(i) (1996).

[7] Importers are liable for the HMT on imports. *See* 19 C.F.R. § 24.24(e)(3)(i) (1996).

class, and not aimed specially at exports, would not help the defendant if in this case the tax was 'laid on articles exported from any State,' because that is forbidden in terms by the Constitution."). Thus, while a tax may be constitutional if imposed on goods during the manufacturing process, even if they are intended for later export, a tax is not constitutional if imposed on those very same goods after they are loaded on a vessel for export or if imposed when delivered to the carrier for export. *See id.* (holding unconstitutional a tax on baseball bats and balls imposed on "[t]he very act that passed the title and that would have incurred the tax had the transaction been domestic, [and that] committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods."). Here, the HMT is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel, rather than at some prior point in time when the goods are not yet bound for export. The exporter, rather than the manufacturer, pays the tax. In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(A), and is based on the value of the goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A). *See also* 19 C.F.R. § 24.24(e)(2)(i) ("The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation."). Thus, we conclude that the HMT, as applied against U.S. Shoe, is imposed on exports.

C.

The government makes several additional arguments in support of the constitutionality of the HMT. First, the government argues that the Export Clause is distinct from the Commerce Clause and, consequently, Congress may impose a tax or duty pursuant to its authority to regulate commerce, so long as the purpose of the tax or duty is not to raise revenue for the general welfare. *See Armour Packing Co. v. United States*, 209 U.S. 56, 79 (1908) ("But it is to be observed that the Constitution provides for a burden only by the way of taxation or duty, and, unless the alleged interference amounts to such taxation or duty, it does not come within the constitutional prohibition."). Thus, according to the government, the relevant inquiry is whether the HMT was enacted pursuant to Congress' authority to regulate commerce, not whether it imposes a burden on exports. *See New Orleans Steamship Ass'n v. Plaquemines Port, Harbor and Terminal Dist.*, 874 F.2d 1018, 1021-22 (5th Cir. 1989) (holding that a port could impose reasonable fees against ships to finance emergency response services). Second, the government argues that the trial court adopted an overly broad interpretation of the Export Clause because it failed to recognize that the sole purpose of the Export Clause was to prevent the northern states from crippling the export-dependent southern states—not to restrict Congress' authority to impose nondiscriminatory fees designed to recoup costs.

We do not agree. The Supreme Court recently reaffirmed the breadth of the Export Clause in the face of the argument that its historical purpose justified a narrow construction. *IBM*, 116 S.Ct. at 1803 ("While

the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language."). Moreover, the power to regulate commerce cannot completely override the effect of the Export Clause. *See North Am. Co. v. SEC*, 327 U.S. 686, 704-05 (1946) ("This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as section 9 of Article 1 and the Bill of Rights."); *see also IBM*, 116 S.Ct. at 1798 (rejecting government's request to "reinterpret the Export Clause to permit the imposition of generally applicable, nondiscriminatory taxes as [the Court has] under the Commerce Clause. . . ."). It is undeniable that Congress may regulate commerce by means such as encouraging or discouraging certain actions using regulatory charges to achieve compliance. *See South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) (imposition of a 50-cent deduction on proceeds of all milk sold commercially is constitutional where "[t]he clear language and structure of the [statute] indicates that its primary purpose is regulation" and the "purpose is to reduce overproduction of milk and shift some of the financial burden of the price support system."). Likewise, it is beyond dispute that Congress may raise money to recover the expenses of a regulatory program. *See, e.g., New Orleans*, 874 F.2d at 1021-22 ("[C]ourts have consistently held that ships may be made to pay for services they get.").

It is, however, also beyond dispute that Congress cannot merely impose a direct economic burden on merchandise for export in the absence of regulation.

See IBM, 116 S. Ct. at 1798-99 (rejecting the government's argument that the Commerce, Import-Export and Export Clauses should be read in harmony to permit the imposition of generally applicable, nondiscriminatory taxes on exports). That is the case here. The government has failed to point to any indication that the HMT is intended to regulate commerce. Indeed, it appears that the HMT regulates nothing. It is not designed to reduce the overall use of the ports. *See Block*, 717 F.2d at 887. Rather, the HMT merely increases the cost of exporting by raising money to maintain the harbors in a manner that is not reasonably connected to the exporter's use of the harbors, and is therefore unconstitutional. Additionally, the government has not persuaded us that the HMT is designed to simply recoup the costs of the services, e.g., port maintenance, provided by the government because the sums paid by the exporter have no reasonable relationship to the cost or the value of the services received by the exporters, and the exporters are not even the direct beneficiaries of the services. Moreover, the mere fact that Congress may have attempted to exert its power under the Commerce Clause, as opposed to the Tax Clause, as evidenced by the fact that the HMT is not designed to raise money for the general welfare, is not dispositive. *See Moon v. Freeman*, 379 F.2d 382, 390-91 (9th Cir. 1967) (stating that the "test for determining when a monetary imposition nominally imposed under the commerce power should be considered an exercise of the power to raise revenue and therefore [be] barred by the export clause" is "to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax

and is controlled by the taxing provisions of the Constitution."). The HMT, in fact, does not regulate or facilitate commerce and is, in effect, a tax. Therefore, as to exporters at least, the HMT is not an appropriate use of Congress' power to facilitate and regulate commerce.

New Orleans is distinguishable because there the fees were not assessed based on the value of the goods but were based on the benefit of services such as pilotage, towage and wharfage as measured by the size or weight of a vessel and paid by those benefiting from the service. 874 F.2d at 1020 (fees based on the number of days in port, the length of the vessel, and whether the ships load or unload cargo). Thus, the fees were based on the services received during port use. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935), also relied on by the government, is similarly distinguishable. There, the State Docks Commission, a state agency, imposed a fee on all vessels of a certain size that entered the port and vessel operators alleged that the fee violated the constitutional provision prohibiting imposition of duties of tonnage by states. *Id.* at 262-63. The fee was designed to reimburse the agency for the costs of policing the harbor. *Id.* at 264. There, however, the parties agreed that the fee was reasonable. *Id.* at 263. Here, the parties have not reached any such agreement, and, as we conclude above, the fee is not reasonable. Moreover, there the vessel operators—the direct beneficiaries of the agency's policing actions—paid the fee. *Id.* Furthermore, all such operators received the benefits for which they paid. *Id.* at 266 ("It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations,

such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it."). Finally, the statute at question in that case also had a regulatory effect "plainly devised to insure the safety of vessels and to facilitate their use of the harbor." *Id.* at 264. Here, there is no such effect. The HMT does not ensure vessel safety, but was designed to cover the costs of dredging the harbors. *See* S. Rep. No. 99-126 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647.

Finally, certain of the amici, given leave to file briefs here, argue that, because the HMT is unconstitutional and therefore void *ab initio*, all monies collected since the implementation of the HMT should be refunded. As US Shoe does not seek such recovery, there is no need for us to reach this issue. Similarly, we do not reach the issue of whether the HMT violates the Port Preference Clause because it is not necessary to our disposition of this appeal.

CONCLUSION

We conclude that the trial court properly exercised jurisdiction pursuant to 28 U.S.C. § 1581(i). Because Customs merely receives the funds from the exporters and transfers the funds to the Trust Fund without exercising any discretion, performing any analysis, calculating any amounts or issuing any decision or order, there was no Customs' "decision" for US Shoe to protest, and jurisdiction therefore could not be proper under 28 U.S.C. § 1581(a). Moreover, because the HMT is a tax, as opposed to a user fee, directly imposed on goods in export transit, we conclude that the HMT statute, as applied to exports, violates the Export Clause and is therefore invalid to the extent it applies to exports. Therefore, the trial court properly (1) granted summary judgment that

the HMT statute was unconstitutional, (2) enjoined the government from collecting further HMT on exports, and (3) ordered it to refund the HMT amounts paid by U.S. Shoe for the period assessed in the complaint. Accordingly, the judgment of the Court of International Trade is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 96-1210

UNITED STATES SHOE CORPORATION,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

MAYER, *Circuit Judge*, dissenting.

Because in my view the Harbor Maintenance Tax (HMT) is a user fee, it does not violate the Export Clause of the Constitution.

Statutes are presumed constitutional. *Fairbank v. United States*, 181 U.S. 283 (1901). We must "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Indeed, courts must strive to avoid constitutional questions. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979) (courts are required to choose any reasonable construction of a statute that would eliminate the need to confront a contested constitutional issue); *Hooper v. California*, 155 U.S. 648, 657 (1895) (courts must resort to "every reasonable construction . . . in order to save a statute from unconstitutionality"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems,

the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

In light of these mandates, the question is whether the HMT is a tax or duty within the proscription of the Export Clause or whether it is a permissible user fee. Generally, a tax is enacted to raise revenue "to go to the general support of the government," *see Head Money Cases*, 112 U.S. 580, 596 (1884), while a user fee is designed as a specific charge for the use of government facilities and services, *see Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981). If it is the latter, we avoid the sticky question whether the assessment violates the Export Clause. So, we must construe the HMT as a user fee, if reasonable to do so, unless it is "plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

Congress thought it was enacting a user fee. It is true that the statute calls the HMT a tax and that it resides in the Internal Revenue Code. It is equally true, however, that the HMT is levied on "port use." The label is not dispositive; we must dig deeper. *See Head Money Cases*, 112 U.S. at 595-96 ("[T]he act is not void because, within a loose and more extended sense than was used in the Constitution, it is called a tax."); *Pace v. Burgess*, 92 U.S. 372, 375 (1875); *see also Fairbank*, 181 U.S. at 304 (courts analyze things, not names).

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *See Crandon v. United States*, 494 U.S. 152, 158 (1990). The object and policy of the HMT help to reveal its true identity. The Senate Report

states: "The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels. The provision of a new, deeper channel is as much a service rendered to the shipper as pilotage, dockage, or wharfage."[1] S. Rep. No. 99-126, at 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644. The House Report similarly states that the HMT is "a *charge on use* by a commercial vessel of a harbor or channel ('port') in the United States for the loading or unloading of commercial cargo on or from the vessel." H.R. Rep. No. 99-228, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6706 (emphasis added). In fact, the legislative history refers repeatedly to the HMT as being based on use. *See, e.g., id.* at 1, *reprinted in* 1986 U.S.C.C.A.N. at 6706 ("Harbor (Port) User Charges"); H.R. Conf. Rep. No. 99-1013, at 228 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6723, 6740 ("Port Use Tax"); S. Rep. No. 99-126, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 6640 ("user taxes"); *id.* at 135, *reprinted in* 1986 U.S.C.C.A.N. at 6705 (additional views of Sen. Lautenberg) ("user fee").

Moreover, the HMT was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (Act), "comprehensive" legislation that addressed myriad problems in the federal water resources development program. *See* S. Rep. No. 99-126, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6641. "Historically, the Federal Government ha[d] financed the full cost of designing, constructing,

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[1] Charges for harbor services like pilotage, wharfage, and dockage are permissible. *See generally Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935).

rehabilitating, maintaining, and operating the . . . coastal harbors of the United States." *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6643-44. Yet, the law did not "impose Federal user fees or charges on the beneficiaries of these expenditures." H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709. Congress found that traditional harbor maintenance policy would "not meet national needs" because it was "unlikely that the Federal Government [would] finance the construction of such port improvements." S. Rep. No. 99-126, at 8, *reprinted in* 1986 U.S.C.C.A.N. at 6646. As the House Report explains: "[A]dditional Federal investment is needed for operations and maintenance of U.S. channels and harbors (ports) in order to improve and maintain such ports for waterborne commerce. Such additional investment in U.S. ports will facilitate economic development and make the Nation's water transportation system more efficient." H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709.

Importantly, Congress found that these needs were "clearly *commercial*." S. Rep. No. 99-126, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6644 (emphasis added). It decided "that a portion of Federal expenditures needed for port operations and maintenance should be borne by the *direct beneficiaries* of such expenditures," commercial users. H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709 (emphasis added). Congress targeted commercial users to help shoulder the fiscal burden of operations and maintenance costs for harbors and inland waterways because they are the parties who enjoy their benefits. The government "has an obvious interest in making those who specifically benefit from its services pay the cost." *Massachusetts v. United States*, 435 U.S. 444, 462 (1978).

One of Congress' primary difficulties, however, was deciding how to craft a user fee to "help defray the costs of maintaining new harbors deeper than 45 feet."[2] S. Rep. No. 99-126, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6647. "In recent years, the Committee considered a variety of proposals involving harbor maintenance. These ranged from diverting a portion of customs revenues for harbor work to port-by-port maintenance fees to more studies. The debate in some cases is between high maintenance harbors and low maintenance harbors; in others it is between large ports and small ports; or between bulk cargo and containerized cargo ports." *Id.* at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6646. In fact, the Senate Subcommittee on Water Resources held twenty-six hearings over three Congresses and more than four years on the Act. *Id.* at 116, *reprinted in* 1986 U.S.C.C.A.N. at 6688. Ultimately, it opted to impose a nationally-uniform fee on the "value of the cargo passing through harbors." *Id.* at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6646; *see also id.* at 111-12, *reprinted in* 1986 U.S.C.C.A.N. at 6684. The House Report explains that "the ad valorem basis of the charges is

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[2] Very few bays and estuaries have natural depths greater than 20 feet. S. Rep. No. 99-126, at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6645. Yet the size of vessels has so increased that harbors forty-five feet deep are now "inadequate for many fully loaded tankers." *Id.* at 8, *reprinted in* 1986 U.S.C.C.A.N. at 6645. Congress found that the constraints of these shallow harbors "add to the costs of importing crude oil and petroleum products," and that "[d]eeper draft harbors would facilitate the export of U.S. coal and, eventually, other bulk commodities, such as grain and ores." *Id.*

the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99-228, at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 6710.

Critically, Congress mandated that fees collected from the HMT be used only for commercial navigation projects.[3] Monies in the Harbor Maintenance Trust Fund (HMTF) may be used only to pay (1) for the operations and maintenance costs of the United States portion of the St. Lawrence Seaway, and for the eligible operations and maintenance costs "assigned to *commercial* navigation of all harbors and inland harbors within the United States," 33 U.S.C. § 2238(a) (1994) (emphasis added), *referenced* in 26 U.S.C. § 9505(c)(1) (1994); and (2) for all of the expenses of administering the HMT incurred by the Departments of Treasury and Commerce and the U.S. Army Corps of Engineers, up to $5,000,000 per fiscal year, 26 U.S.C. § 9505(c)(3).[4] So, HMT charges, collected from commercial users, may only be expended for harbor operations and maintenance costs incurred on their behalf.

The government has been true to this constraint. In its initial report to Congress on the HMTF's

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[3] Interest earned on monies in the Harbor Maintenance Trust Fund (HMTF) also remains in the fund.

[4] 26 U.S.C. § 9505(c)(2) permits monies in the fund to be used to pay rebates of tolls or charges levied for use of the St. Lawrence Seaway, as required by 33 U.S.C. § 988a. Section 988a was amended in 1994, however, to waive the collection of tolls or charges on commercial vessels, instead of requiring commercial users to pay the toll or charge and then obtain a rebate. Pub. L. No. 103-331, § 339(a), 108 Stat. 2496.

status, the government explained that operations and maintenance costs for commercial navigation were accounted for in the "Corps of Engineers Management Information System." *First Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1987—1992* at 2, ¶ 6 [hereinafter *First Report*]. In deciding which expenditures were reimbursable, the government recognized that some projects have both a "commercial navigation" purpose and some other purpose, such as recreation, hydropower, or flood control. *Id.* at 3, ¶ 7. All operations and maintenance expenditures made for single purpose commercial navigation projects were considered subject to reimbursement from the HMTF. *Id.* In contrast, on joint purpose projects, the government allocated costs to the project's different purposes in proportion to the benefits realized for each purpose, recovering only the commercial navigation costs. *Id.*; *see also Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1993* at 1-2, ¶ 4 (indicating continued compliance) [hereinafter *Second Report*]. This ensures that HMT funds collected from commercial users are spent for their benefit.

In sum, it surely does not violate Congress' intent to construe the HMT as a user fee. The question is whether it is reasonable to interpret it that way. In analyzing whether a particular charge constitutes a user fee, the Court has asked whether it: (1) discriminates against the constitutionally-protected interest; (2) is based on some fair approximation of the use of some system; and (3) is structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. *Massachusetts*, 435 U.S. at

464; *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17 (1972).

First, the HMT does not discriminate against exporters. Indeed, the trial court did not hold to the contrary; it simply bypassed the issue and ruled the HMT a tax based on the second and third prongs of the *Massachusetts* test. The HMT is levied against commercial users of United States ports and harbors, including exporters, importers, domestic shippers, and passenger carriers (except ferries, as defined). Congress found these groups to be the principal beneficiaries of harbor operations and maintenance projects. It also required that HMT monies be expended only for their benefit. That the statute exempts some harbor users from payment does not render the HMT discriminatory against exporters. Some exempted users, like recreational users, do not and would not benefit from operations and maintenance projects funded by the HMT because those projects are commercial in nature. Requiring such users to pay the fee would be unfair. Congress made reasonable policy decisions to exempt other users, such as nonprofit organizations transporting humanitarian and development assistance cargo. 26 U.S.C. § 4462(h); *see also id.* § 4462(b) (exempting cargo transported within Alaska, Hawaii, or any United States possession, or between those locales and the United States mainland "because of the high dependence of these islands' economies on waterborne commerce." H.R. Rep. No. 99-228, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6710). These exemptions do not compromise the HMT's non-discriminatory status.

Second, the HMT is based on a fair, if imperfect, approximation of exporters' use of, or privilege to use, United States harbors and ports. When the government "applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system." *United States v. Sperry Corp.*, 493 U.S. 52, 61 (1989). "Perfect uniformity and perfect equality of taxation, in all the respects in which the human mind can view it, is a baseless dream." *Head Money Cases*, 112 U.S. at 595. Consequently, the amount of a user fee need not be "precisely calibrated to the use that a party makes of Government services." *Sperry*, 493 U.S. at 60.

The government concedes that the HMT, like most user fees, is imperfect, but contends that it is a fair approximation of use. U.S. Shoe argues, and the court held, that this is wrong for four primary reasons: (1) all harbor users do not pay the fee, (2) there is no correlation between the charges collected at a particular port and expenditures for that port's maintenance and operations, (3) low-value, bulk cargo importers and exporters use the port facilities to a greater extent than high-value, non-bulk cargo importers and exporters yet pay lower fees, and (4) the ad valorem nature of the fee does not accurately measure use. The first three, of course, are the precise concerns with which the legislature wrestled over three Congresses and more than four years. The fourth challenge is to what Congress found to be "the only acceptable basis on which to impose such charges" because it was "uniform" and "minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99-228, at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 6710. "This was obviously the judgment of Congress and we [should]

abide by it." *Sperry*, 493 U.S. at 62, 110 S.Ct. at 395. Notwithstanding, I address each issue in turn.

For the same reasons that the HMT is not discriminatory, the fact that all users of our harbors and ports do not pay the fee does not mean it is an unfair approximation of use by those against whom the assessment is levied. *See Evansville*, 405 U.S. at 717-18 (upholding a user fee as a fair approximation of the use of the facilities for whose benefit they are imposed even though "a majority of the actual number of persons who use facilities of the airports involved" were exempt, because the exemptions were not "wholly unreasonable"). Nor is there merit to U.S. Shoe's second argument that because fees collected at a particular port are not necessarily expended for operations and maintenance at that port, the fee is not a fair measure of use. This is an overly narrow view. Users do not benefit only from access to the particular ports they use. Every exporter has all ports and harbors available to it. Those that never use certain ports benefit from them "in the sense that [they] are available for their use if needed and in that" the provision of better harbor maintenance services "makes the [ports] safer for all users." *Massachusetts*, 435 U.S. at 468; *see also Sperry*, 493 U.S. at 63.

Finally, U.S. Shoe's related third and fourth arguments do not establish that the HMT is not a fair approximation of use. Initially, there is great irony in the argument that the charge is unfair because high-value, non-bulk cargo carriers are assessed higher fees than low-value, bulk cargo shippers, yet allegedly "use" harbors to a lesser extent. Exporters generally ship low-value cargo, such as grain and coal, which is transported in bulk. *See First Report* at 3, ¶ 9. Importers, on the other hand, tend to ship

high-value cargo, like electronics and automobiles, which is not shipped in bulk. *Id.* Consequently, exporters are generally assessed lower fees than importers, yet they purportedly "use" the harbors to a greater extent because of the bulk nature of their shipments. Thus, it is the exporters themselves who allegedly are not bearing their fair share.

In addition to the irony, U.S. Shoe's argument is unpersuasive. First, not all bulk cargo is of low value, nor, undoubtedly, is all non-bulk cargo of high value. For example, some "high value" commodities, such as "petroleum," are transported in bulk. *Id.* Thus, to say that the HMT is unfair because low-value cargo carriers use ports to a greater extent than high-value cargo carriers is not wholly accurate. Second, even if a high-value cargo shipper never requires the use of harbors deeper than forty-five feet, there is nothing in the record to support the notion that the only operations and maintenance projects undertaken with HMTF monies are deep-harbor dredging. Indeed, U.S. Shoe does not argue that projects financed with HMTF monies are so limited. While projects are limited to those that inure to the benefit of commercial users, the government has discretion to decide which projects those are. That some users, like exporters, transport some bulk products of lower value than some non-bulk products transported by other users, does not make the HMT a tax. Nor does its ad valorem structure.

It is beyond dispute that an ad valorem charge can be a user fee. *See Sperry*, 493 U.S. at 59-64; *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990); *see also Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992). Notwithstanding, U.S. Shoe attempts

to distinguish *Sperry* and *Alamo* on the ground that the parties assessed the user fees in those cases were direct beneficiaries of the provided services. Here, it argues, the direct beneficiaries are the vessel owners, not the importers and exporters who pay the fee. There are two problems with this argument. First, it flies in the face of Congress' finding that exporters are the direct beneficiaries. Congress decided that a portion of federal expenditures needed for port operations and maintenance should be borne by the *direct beneficiaries* of such expenditures, among whom it obviously included exporters and importers. Second, the Court rejected a similar argument in *Evansville*. There, it held that it is not "particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses." 405 U.S. at 714. Similarly, here it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses.

Finally, the HMT is structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. The relevant inquiry is whether Congress *structured* the HMT so that the monies collected under it are "fairly apportioned" to the government's cost of providing commercial harbor maintenance services. U.S. Shoe argues, and the trial court held, that the HMT fails this prong for two primary reasons: (1) it funds projects yet to be commenced rather than reimbursing the government for completed projects, and (2) the HMTF has accumu-

lated a large surplus. The first objection is misplaced; the second, while troubling, is unavailing.

Regardless of the factual accuracy of U.S. Shoe's first concern,[5] when viewed in light of the purposes for which the HMT was enacted, it is of little relevance that HMT monies might fund port operations and maintenance projects not completed, or even initiated, at the time of collection. The HMT is not a short-term fix to the myriad problems that plague our nation's waterborne commerce. It is a long-term vehicle to improve and to maintain the harbors for the continuing benefit of United States commerce. Indeed, Congress expressly found that the fee will facilitate economic development. "[A] surplus of revenue over outlays in any one year can be offset against actual deficits of past years and *perhaps against projected deficits of future years.*" *Massachusetts*, 435 U.S. at 470 n. 25 (emphasis added). The Eleventh Circuit has also recognized that user fees may be expended on future projects. In *Alamo*, it held that "given the long term nature of maintaining and developing an airport, it was appropriate . . . to factor in future development plans when setting user fees." 906 F.2d at 522. Thus, it is of little moment that HMT monies are purportedly expended to fund projects not

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[5] The *First Report* states that "the actual transfer of funds from the [HMTF] is for expenditures made in the previous fiscal year. In other words, FY 1990 expenditures are shown as transfers from the [HMTF] in FY 1991, and so forth. Corps expenditures are never made directly from the [HMTF], nor are transfers made on the basis of estimates or projections." *First Report* at 3, ¶ 7. This indicates that FY 19xx projects are reimbursed from the HMTF with FY 19xx, or perhaps surplus, funds in FY 19xx+1.

yet started rather than to repay the government for services that have already been rendered.

Similarly, the fact that the HMTF enjoys, or perhaps suffers, a large surplus does not resolve whether Congress structured the HMT as a tax or a user fee. To be sure, the substantial surplus weighs against finding the HMT a user fee. But this does not, of itself, render it a tax. A closer look reveals that the HMT's structure was not ill-conceived. From 1987 through 1990, during which the HMT was only 0.04% ad valorem and paid just 40% of eligible Corps costs, revenues and expenditures were closely aligned. *See First Report* at 6, ¶ 13. For example, in FY 1988, HMTF expenditures actually *exceeded* revenues by approximately $6 million, and the ending balance was just $9 million. *Id.*

Trouble began in 1991, when Congress increased the ad valorem rate to 0.125% in order to fund 100% of eligible Corps expenses and to reimburse the National Oceanic and Atmospheric Administration (NOAA) $45.5 million for its annual commercial navigation costs. While the revenue generated under the higher rate was only slightly less than projected, expenditures were considerably less, resulting in a growing HMTF surplus. Withdrawals from the HMTF were less than anticipated due primarily to (1) the absence of legislation authorizing NOAA to receive its commercial navigation costs, (2) the fact that the Corps' operations and maintenance budget was lower than had been projected in 1990 when the new ad valorem rate was established, and (3) withdrawals from the HMTF for improved administration and enforcement, while authorized, remained unappropriated. *See, e.g., Second Report* at 5, ¶ 10.

The surplus has certainly burgeoned in recent years as a result of these unforeseen decreases in projected expenditures, but that does not mean that the HMT's structure shows it to be a tax. Congress is not prescient. In fact, the government recognizes that this is a problem about which something must be done. *See Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 7, ¶ 16 ("The growing surplus in the HMTF remains. This can only be corrected by widening the authorized uses for HMTF monies, or by reducing the HMF [sic] to a level consistent with its annual expenditures."). Congress has already amended the HMT statute once. There is no reason to believe that it will not correct the growing surplus. Until then, commercial users know that all HMT monies plus interest may only be expended for harbor operations and maintenance projects with commercial purposes. They may not be used for the general support of the government. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 371-72 (1994) (declining to decide whether an airport user fee, which had accumulated "huge surpluses," was excessive under *Evansville*, in part because all fees collected had to be expended for the airport's capital or operating costs, and the airlines challenging the fee had not suggested that the surplus was being used for any purpose other than airport-related expenses); *Head Money Cases*, 112 U.S. at 596 (charges imposed on shipowners for each immigrant they brought into the United States, which were deposited into an "immigrant fund" appropriated in advance for the temporary care of passengers whom shipowners transported, was not a tax).

I would reverse the judgment of the Court of International Trade.

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 95-173

Court No. 94-11-00668

UNITED STATES SHOE CORP., PLAINTIFF

v.

UNITED STATES, DEFENDANT

[Oct. 25, 1995]

OPINION

Before: DiCARLO, Chief Judge and RESTANI and MUSGRAVE, JJ.

DiCARLO, Chief Judge:

Article I, Section 9, Clause 5 of the United States Constitution (the "Export Clause") provides "[n]o Tax or Duty shall be laid on Articles exported from any State." The question presented is whether the Harbor Maintenance Tax, 26 U.S.C. §§ 4461-62 (1988 & Supp. V 1993) (Internal Revenue Code) [hereinafter "Tax"], when imposed upon merchandise exported from the United States, violates this prohibition. The court concludes that it does.

I

This case comes before the court on cross-motions for summary judgment pursuant to USCIT Rule 56. The parties agree there are no material facts in dispute. They also agree that the court has subject-matter jurisdiction to determine the constitutionality of the Tax.

Congress has given the Court of International Trade jurisdiction over matters arising out of the Tax: "For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2). This language directs that taxes imposed upon both imports and exports shall be treated as if they were customs duties, in other words, as import transactions.

Congress's purpose in centralizing jurisdiction over import transactions in the Court of International Trade was to dispel the jurisdictional confusion existing as to the Court of International Trade's predecessor, the Customs Court, and to reflect the true scope of the court's jurisdiction. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758-59. As the legislative history of the Customs Courts Act of 1980 shows, Congress sought, by permitting a single court to hear these suits, "to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction." H.R. Rep. No. 1235, at 47, 1980 U.S.C.C.A.N. at 3759. Accordingly, Congress

granted the court exclusive jurisdiction over *any* civil action against the United States arising out of federal laws governing import transactions, because of the court's "already developed expertise in international trade and tariff matters." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 12 Fed.Cir. (T) ——, ——, 18 F.3d 1581, 1586 (1994). This authority includes the inherent responsibility to review challenges to the constitutionality of a law within that area of expertise. *See* 28 U.S.C. §§ 251, 1331, 1585 (1988) (providing this court with all powers of U.S. district courts including original jurisdiction over actions arising under Constitution); *see, e.g.*, 28 U.S.C. § 255(a)(1) (1988) (permitting designation of three-judge CIT panels to hear and determine constitutional issues). In addition to the statutory language, the legislative history of the Tax supports this court's jurisdiction. S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6715.

Finally, this is not the first case where the court has taken jurisdiction over matters arising from the Tax; the court recently exercised jurisdiction over claims for restitution of taxes paid by passenger liners pursuant to the Tax in *Carnival Cruise Lines, Inc. v. United States*, 18 CIT ——, 866 F. Supp. 1437 (1994). In sum, in light of the Tax's plain language, its legislative history and the Court of International Trade's traditional role as the proper forum for review of actions governing import transactions, the court possesses jurisdiction to hear and determine the constitutionality of the Tax.

II

Congress established the Tax as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (codified as amended in scattered titles of U.S.C.) [hereinafter the "Act"]. While it named the charge imposed upon port users a "tax," 26 U.S.C. ch. 36, subch. A, this nomenclature is not necessarily binding on the court, *see Fairbank v. United States*, 181 U.S. 283, 304, 21 S.Ct. 648, 656, 45 L.Ed. 862 (1901) ("we must regard things rather than names"). The provisions of the Act, including the Tax, are severable. Water Resources Development Act § 949, 33 U.S.C. § 2304 (1988).

The Tax imposes an *ad valorem* tax on "any port use" of federally-maintained navigable waterways. 26 U.S.C. §§ 4461, 4462(a)(2). The statute defines "port use" as "the loading [and] unloading of commercial cargo [on or] from[ ] a commercial vessel at a port," 26 U.S.C. § 4462(a)(1), and "port" as any channel or harbor open to public navigation that is not an inland waterway, 26 U.S.C. § 4462(a)(2)(A). The Tax is applied against imports and exports, and domestic shipments, as well as passengers. 26 U.S.C. §§ 4461(c)(1), 4462(a)(3)(A). Presently, the amount of the Tax imposed is 0.125 percent of the value of the commercial cargo involved. 26 U.S.C. § 4461(b) (Supp. V 1993). This is without regard to the size of the vessel, the manner or extent of use of port facilities, or the condition of the particular port. For passengers, the statute calculates value based on the actual charge paid for the transportation. *See* 26 U.S.C. § 4462(a)(5)(B). Further, Congress does not distinguish among port users or particular ports

in expending funds for harbor maintenance or operations, even though some ports or users may contribute the majority of the fees paid.

The Tax exempts certain cargo and passengers from its burden. These exemptions include fish or other aquatic animals not previously landed on shore, ferry passengers, bunker fuel, ships' stores, or equipment necessary for operation of a vessel, bonded commercial cargo entering the United States for transhipment to a foreign country, and any cargo shipped between the continental United States and Alaska, Hawaii or any U.S. possession for ultimate consumption at its destination with the exception of crude oil transported from Alaska. 26 U.S.C. § 4462. The Tax also exempts intraport movement of cargo, recreational and *de minimis* port use, port use by the U.S. government, and humanitarian and development assistance cargo. *Id.* Congress's stated purpose in enacting the Tax was to have commercial shippers fund the maintenance of U.S. harbors and ports. *See* S. Rep. No. 228, at 5, 1986 U.S.C.C.A.N. at 6709; S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644.

In enacting the Tax, Congress concurrently established the Harbor Maintenance Trust Fund, 26 U.S.C. § 9505 (1988 & Supp. V 1993) [hereinafter "Trust Fund"], to carry out the purposes of the Act. Monies collected pursuant to the Tax are transferred to the Trust Fund for disbursal upon further appropriation by Congress in accordance with the Trust Fund's provisions. 26 U.S.C. § 9505(b), (c). Since 1991, Congress has authorized appropriations from the Trust Fund to offset up to 100 percent of the eligible operation and maintenance outlays for harbors under

the Act. Water Resources Development Act of 1990 § 316, 33 U.S.C. § 2238 (Supp. V 1993). Congress did not limit expenditure of Tax revenues to the U.S. Army Corps of Engineers, the largest beneficiary of the Trust Fund. Rather, the Departments of the Treasury and Commerce, and the National Oceanic and Atmospheric Administration are also potential recipients of Tax revenues. 26 U.S.C. § 9505(c); *see* Office of Management and Budget, Executive Office of the President, *FY 1996: Budget of the U.S. Government, Appendix*, 376, 802 (1995).

Despite the number of agencies eligible to receive funds, the Trust Fund has been running a yearly surplus since its inception. This surplus burgeoned with the increase in the Tax from 0.04% to 0.125%, (Br. of *Amicus* Amoco Chem. Co., Ex. A (*Second Annual Report to the Congress on the Status of the Harbor Maintenance Trust Fund For Fiscal Year 1993* 5 (1994))) [hereinafter "*Second Annual Rep.*"], and is "on budget." The practice of listing trust fund revenues on budget permits them to be included in calculations of the federal budget deficit. Thus, any monies contributed by such funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit. *See* H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985) ("[t]he increase in net budget receipts [provided by the Tax] will reduce the potential Federal budget deficit by a like amount by providing a new source of user-related revenues rather than relying completely on general fund appropriations"). As of 1994, the government had collected over 500 million dollars from exports alone. (*See* Br. of *Amicus* Polaroid Corp., Ex. A (*First Annual Report to Congress on the Status of the Harbor*

Maintenance Trust Fund Fiscal Years 1987- 1992 4 (1993))) [hereinafter "*First Annual Rep.*"]; *Second Annual Rep.* at 3.

Plaintiff paid the Tax on articles exported for the period April 1 through June 30, 1994. It now sues for recovery of those monies, claiming imposition of the Tax violates the Export Clause.

III

An act of Congress is presumed to be constitutional. *Fairbank*, 181 U.S. at 285, 21 S. Ct. at 649. Any excess in the exercise of legislative power or conflict with the restrictions imposed by the fundamental law should be clear before the court overturns an enactment of the legislature. *Id.* Yet, as Chief Justice Marshall expounded in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), "the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Id.* at 180.

A.

Defendant contends that the Tax is a valid exercise of Congress's constitutional authority to regulate foreign and interstate commerce, and does not implicate its taxing powers. According to defendant, although the Export Clause restrains those powers, the Clause cannot circumscribe Congress's unlimited capacity to regulate commerce.

The court concludes the power to regulate commerce does not eclipse the Export Clause. Although Congress can adopt the methods it deems necessary to accomplish its goals pursuant to the regulation of commerce, this authority is limited by other provisions of the Constitution. *United States v. Lopez*, — U.S. ——, ——, 115 S.Ct. 1624, 1627, 131 L.Ed.2d 626 (1995) (providing that commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824)); *North Am. Co. v. S.E.C.*, 327 U.S. 686, 704-05, 66 S.Ct. 785, 795-96, 90 L.Ed. 945 (1946) (noting Congress's commerce powers are limited by express provisions in other parts of Constitution); *Rodgers v. United States*, 138 F.2d 992, 994-95 (6th Cir. 1943). Accordingly, even if the court were to find the Tax to be a charge imposed under the commerce power, such a charge is still subject to the restrictions of the Export Clause if it in fact serves as a tax or duty. For example, a charge upon exports imposed under the Commerce Clause as a user fee, or to regulate commerce, would not be immune from the restrictions of the Export Clause if the court found the charge actually to be a tax or duty on exports. The court looks to substance over nomenclature.

The origin of the Export Clause indicates it is to have broad effect. Two amendments seeking to limit it were rejected. The first would have limited the Clause by adding "for the purpose of revenue" to the prohibition against taxes or duties on exports. II *The Records of the Federal Convention of 1787* 363 (Max Farrand ed., 1937). The second amendment would

have permitted export taxes if approved by a two-thirds majority in both Houses of Congress. Note, *Constitutionality of Export Controls*, 76 Yale L.J. 200, 203 (1966). The Constitutional Convention deliberately chose to leave exports unburdened; and, in so doing, persuaded the South to join the new union. *See id.* at 204. For the Southern States, the Export Clause addressed concerns that a Congress controlled by the North would impose burdensome levies on southern exports. *International Business Machs. Corp. v. United States*, 13 Fed. Cir. (T) ——, ——, 59 F.3d 1234, 1236 (1995) [hereinafter "*IBM*"].

The Export Clause serves to keep all exportation free of any tax burden. *Fairbank*, 181 U.S. at 290, 21 S.Ct. at 651. As the Court in Fairbank explained, "[i]f all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation." *Id.* at 293, 21 S.Ct. at 652.

B.

The court finds the Harbor Maintenance Tax as it applies to exports constitutes a tax prohibited by the Export Clause and does not fall under Congress's Commerce Clause powers. Defendant contends the Water Resources Development Act does not establish a tax upon exports in violation of the Export Clause, because enhancement of the general revenue is not its primary purpose, but is merely one aspect of a comprehensive legislative program providing for conservation and development of the nation's water resources infrastructure. According to defendant, the value of the benefit provided by the program,

maintenance of safe and efficient ports and harbors, reasonably relates to the charges imposed and accrues, at least in part, to an identifiable private beneficiary. In considering the Act as a whole, defendant contends Congress simply imposed a user fee "for the purpose of making effective the congressional enactment." (Def.'s Mem. in Opp'n to *Amici* at 54) (quoting *Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir. 1967)).

For defendant to succeed on this argument, the court must find that regulation is the primary purpose of the Tax, *see South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied* 465 U.S. 1080, 104 S.Ct. 1444, 79 L.Ed.2d 764 (1984), or alternatively, that Congress sought to raise money to recoup the costs of services provided to the payer pursuant to a regulatory scheme, *see Pace v. Burgess*, 92 U.S. 372, 375-76, 23 L.Ed. 657 (1876). The Tax serves neither purpose.

First, the Act neither discourages nor regulates use of a harbor; neither does it so intend. In *Moon*, the court upheld an export certificate program for wheat farmers. 379 F.2d at 391-93. It found the program's monetary imposition for overproduction, essentially a penalty for non-compliance with the Secretary of Agriculture's production controls, did not violate the Export Clause. *Id.* The court held where regulation is the primary purpose of the statute as a whole and revenue also is obtained incidentally through imposition of sanctions, the Constitution will not necessarily prohibit the charge. *Id.* at 391 (quoting *Rodgers*, 138 F.2d at 994). Here, the Act does not have regulation as its primary purpose. For example, it does not seek to control the amount or manner of port use. Further, the Act does not seek

to influence commercial practices, or seek to enforce compliance with a legislative goal as did the Agricultural Adjustment Act of 1938, as amended by the Agriculture Act of 1964, considered in *Moon*, or the Agricultural Act of 1949, as amended, considered in *Block*. Congress instead sought funding for the extensive maintenance projects envisioned under the Act. S. Rep. No. 126 at 7, 1986 U.S.C.C.A.N. at 6644 (noting Congress intended Harbor Maintenance Tax as new tax to cover portion of Federal spending on harbor maintenance).

Second, there is little indication that Congress intended to establish a user fee. Rather, Congress found an alternative way to fund expenditures it intended to make. When Congress enacted the Tax, it intended to use the Tax to pay the costs of developing, operating, and maintaining port projects. H.R. Rep. No. 251, at 19; S. Rep. No. 228, at 5, 1986 U.S.C.C.A.N. at 6709. The Act permitted disbursement of Tax proceeds to the U.S. Army Corps of Engineers for recovery of up to 40 percent of its eligible operation and maintenance outlays. Water Resources Development Act of 1986 § 210(a)(2), 33 U.S.C. § 2238(a)(2) (1988); *see First Annual Rep.* at 1 (noting "[f]ederal expenditures for [port and harbor maintenance] were determined to be synonymous with expenditures made by the Army Corps of Engineers"). The Water Resources Development Act of 1990 increased the rate of the Tax and allowed the Corps of Engineers to recover up to 100 percent of its "eligible operations and maintenance costs." 33 U.S.C. § 2238(a)(2) (Supp. V 1993). Since its inception, the Trust Fund has accumulated significant surpluses. *See* 141 Cong. Rec. E519 (daily ed. Mar. 6, 1995) (statement of Rep.

McDermott). Accordingly, we take note of the warning in *Moon*, "[c]ertainly if the record in any way indicated that substantial amounts of revenue had been generated by the sale of export certificates, we would hesitate before deeming the program an exercise of the commerce power." 379 F.2d at 392.

The court finds the primary purpose of the Tax is to raise revenue, as Congress has imposed "a duty under the pretext of fixing a fee," *Pace*, 92 U.S. at 376. For a charge to withstand constitutional challenge under the Export Clause, it must defray costs of services rendered pursuant to the regulation of commerce, and the taxes collected may not be excessive. In the *Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580, 595-96, 5 S. Ct. 247, 252, 28 L.Ed. 798 (1884), the Supreme Court upheld a *per capita* charge on non-U.S. citizens arriving in the United States by ship. The Court found the statute in question imposed the fee to defray costs appropriated in advance for inspection of immigrants before landing, and for their care and provision afterward. *Id.* at 590, 5 S.Ct. at 249. The Secretary of the Treasury was to "distribut[e] the fund in accordance with the purpose for which it was raised, not exceeding in any port the sum received from it." *Id.* As such, the charges imposed were incidental to the regulation of commerce and directly reimbursed the costs of services rendered to the individual.

Similarly, in *Pace*, the Supreme Court concluded that a fee for stamps used to distinguish tobacco intended for export—and thus to alleviate it from the heavy exactions placed upon tobacco sold domestically—was not a tax on exports. *See* 92 U.S. at 375-76; *see also Turpin v. Burgess*, 117 U.S. 504, 6

S. Ct. 835, 29 L.Ed. 988 (1886) (sustaining, on similar grounds, constitutionality of charge imposed to identify tobacco packages intended for export). Rather, the Court characterized the stamp as a fee "accruing in the due administration of the laws and regulations," serving simply as "compensation given for services properly rendered." *Pace*, 92 U.S. at 375. The Court found the payment for the services rendered, through identification of tobacco exported, was no different than "the fee for clearing the vessel in which [the tobacco] was transported, or for making out and certifying the manifest of the cargo." *Id.* The amount of the fee never exceeded the costs to produce the stamps and the cost of services necessary to give the exporter the benefit of the exemption from taxation; identification of the tobacco provided the exporter the direct benefit of a domestic tax exemption.

In contrast, little nexus binds the imposition of the *ad valorem* tax on cargo to the costs of port maintenance and regulation of shipping. As the exaction is tied to value and there is no mechanism to ensure that the fees collected will be used "only or primarily for the cost of" port maintenance associated with the shipping that is taxed, the Tax is not a user fee imposed under the commerce power. The fees collected, rather, yield funds for the purpose of maintaining and developing American ports and harbors for all uses, commercial and recreational. Further, the Tax funds projects yet to be commenced, or even envisioned, rather than services already rendered. Application of the Tax has produced a substantial surplus in excess of the costs incurred. The court therefore finds the Tax raises revenue, and is not

a user fee imposed pursuant to the regulation of commerce.

The Supreme Court recently has used another test to distinguish between an impermissible tax and a user fee. In *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978), the Court considered whether an aircraft registration fee levied on state police aircraft violated the judicially-implied intergovernmental tax immunity doctrine first set forth in *Collector v. Day*, 78 U.S. (11 Wall.) 113, 20 L.Ed. 122 (1871). In concluding that it did not, the Court relied on three criteria derived from *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972). To constitute a user fee, as contrasted with a tax, the Court held: (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some system; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. *Massachusetts*, 435 U.S. at 466-70, 98 S. Ct. at 1166-68.

The Tax fails classification as a user fee under the test presented in *Massachusetts*. Although the Export Clause clearly is designed "to protect constitutionally valued activity from undue burden" that could result from certain taxing measures, *see id.* at 462, 98 S. Ct. at 1164, the court need not decide the issue of whether the tax is discriminatory. Even assuming, *arguendo*, that the Tax is nondiscriminatory, the court finds the Tax fails the remaining two prongs of the *Massachusetts* test.

First, the charge is not based upon some fair approximation of the cost of the benefits port users receive from harbor maintenance and development projects. Low value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters. Yet, the cost to the latter is greater than that to the former. Further, most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures. (*See, e.g.*, Br. of *Amicus* Amoco Chem. Co., Ex. G (Army Corps of Engineers, *Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports* (1992))) (draft document) (noting of $78,711,000 estimated collected 1992 taxes on exports and imports from Port of Los Angeles, only $162,000 returned in port operation and maintenance expenditures). Additionally, although only certain commercial users must pay the tax, they are not the sole users of the ports nor the only beneficiaries of the maintenance and development projects. Based on the foregoing, the court does not find the charge imposed under the Tax is based on a fair approximation of the costs of benefits received by port users.

Second, the charge is excessive in relation to the cost to the government. The Tax is used to fund projects yet to be commenced, or even envisioned, rather than to repay the government for services rendered. The Tax has produced a substantial surplus, that is rapidly expanding, in excess of costs incurred. *Second Annual Rep.* at 5.

In sum, the Tax neither seeks to regulate Commerce nor repay the costs of services rendered; moreover, the Tax fails the alternative test provided

by *Massachusetts*. Accordingly, the Tax is subject to the prohibitions of the Export Clause.

C.

Defendant questions whether the Harbor Maintenance Tax is a tax levied upon "exported articles" within the meaning of the Export Clause. According to defendant, a tax or fee only violates the Export Clause if it is levied on goods by reason of their exportation, *e.g.*, if such goods have entered the export stream. Defendant contends the broad prohibition of the earlier cases against a tax upon goods having entered the export stream was curtailed by *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L.Ed.2d 495 (1976), and further constrained in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978).

Further, according to defendant, imposition of the Tax upon loading of freight is merely intended to ensure that those who actually use the ports would pay. As such, the time when the Tax attaches has no other significance for purposes of assessment of the fee upon exports. The motivation behind imposing an *ad valorem* charge, defendant insists, was to minimize possible competitive disadvantages among cargo types and U.S. ports that would have arisen from a user charge.

In any case, defendant argues the *Michelin* and *Washington Stevedoring* tests now examine the nature of the tax at issue, rather than the status of the article. Those cases explored whether the taxes were upon "exports as such" and whether they offended the policies protected by the framers of

the Constitution. Those policies, defendant argues, include promoting uniformity among the former colonies and preventing the North from crippling the export-dependent Southern States pursuant to the Import-Export Clause. U.S. Const. art. I, § 10, cl. 2 ("No States shall . . . lay any Imposts or Duties on Imports or Exports . . . ."). Specifically, defendant contends *Michelin* established that a nondiscriminatory *ad valorem* property tax did not violate the Import-Export Clause simply because it applied to recently imported goods—there, tires maintained at a wholesale distribution warehouse. 423 U.S. at 286, 96 S. Ct. at 541. Similarly, defendant contends *Washington Stevedoring* held that a nondiscriminatory local tax that compensates the state for services rendered also failed to implicate the concerns of the Import-Export Clause. 435 U.S. at 755, 98 S. Ct. at 1401.

Integral to these tests, defendant contends, is the court's examination of whether the charge discriminates in imposing its burden. According to defendant, a nondiscriminatory charge for a service that facilitates export activity does not violate the Export Clause. Defendant maintains the Tax is such a charge. The court disagrees.

In examining whether the Tax burdens "exported articles," the court limits its inquiry to the Export Clause, for there is a distinct difference in language between the Import-Export Clause and the Export Clause. *See IBM*, 13 Fed. Cir. (T) at —— - ——, 59 F.3d at 1238-39. The decisions in *Michelin* and *Washington Stevedoring* attached significance to the distinction between "Imposts and Duties," and the Export Clause's broader prohibition. *See Michelin*,

423 U.S. at 290, 96 S. Ct. at 543; *Washington Stevedoring*, 435 U.S. at 759-60, 98 S.Ct. at 1404. As the Supreme Court in *Michelin* noted, the Import-Export Clause only bans "Imposts or Duties" and is not "a broad prohibition of every 'tax.' " 423 U.S. at 290, 96 S. Ct. at 543. According to the Federal Circuit, a difference in policy intended by the framers of the Constitution underlies the difference in language:

> While the Import-Export Clause was intended to prohibit States from imposing a 'transit fee' on goods moving in foreign commerce, the Export Clause served the broader purpose of 'forbid[ding] federal taxation of exports.' The Supreme Court's current narrower view of the prohibition in the Import-Export Clause thus does not dictate that the Export Clause be given a similarly narrow construction.

IBM, 13 Fed. Cir. (T) at ——, 59 F.3d at 1239 (citations omitted). Defendant's citations of *Michelin* and *Washington Stevedoring* are, thus, inapplicable.

Moreover, even if this court were to assume *Michelin* and *Washington Stevedoring* apply to the Export Clause, the cases remain distinguishable. *Michelin* concerned imported tires that had already lost their identity as a unit and as an import after being unloaded and stored within a warehouse. *See* 423 U.S. at 280, 96 S.Ct. at 538. At the warehouse, workers unloaded the containers in which the tires were shipped, sorted the tires by size and style, and stacked them on wooden pallets, without segregation by place of manufacture. *Id.* The tires required no further processing to ready them for sale and delivery to franchised dealers. *Id.* In this sense, the Court found the warehouse operated "no differently than . . .

a distribution warehouse utilized by a wholesaler dealing solely in domestic goods." *Id.* at 302, 96 S. Ct. at 548. Accordingly, the holding in *Michelin* turned on the fact that the goods were no longer in import transit. *Id.* at 286, 96 S.Ct. at 541.

As distinguished from the unloaded and unpacked imports in *Michelin*, the cargo taxed in this case has entered the stream of exports. The cargo, as it is loaded on board the vessel, is in transit, and the Tax falls upon the merchandise itself. As such, it is an article protected by the Export Clause. *Michelin* is inapplicable.

In *Washington Stevedoring*, the Supreme Court upheld a business and occupation tax imposed by the State of Washington upon the value of certain services rendered—the loading and unloading of cargo. *Id.* at 737, 758, 98 S.Ct. at 1392, 1403. The Court distinguished the stevedoring services from maritime insurance policies covering such goods. *Id.* at 756 n. 21, 98 S.Ct. at 1402 n. 21. The Court found placing a tax upon the insurance policies was more suspect, and likely unconstitutional as a violation of the Import-Export Clause, because "the value of goods [bore] a much closer relation to the value of insurance policies on [those goods] than to the value of loading and unloading ships." *Id.* As the amount of the Tax *ad valorem* is tied directly to the value of the goods, *Washington Stevedoring* is equally inapplicable.

Two distinct tests have evolved from case law for determining whether the Export Clause will immunize an article from taxation. First, the court must examine the immediacy of exportation. Second, the court considers the proximity of the tax imposed to

the value of the articles exported. Here, neither test supports the constitutionality of the Tax.

In delineating a zone where an article in the stream of commerce melds into the export stream, the court looks to see whether the article is in the actual process of exportation, and whether it "has begun its voyage or its preparation for the voyage." *Cornell v. Coyne*, 192 U.S. 418, 428, 24 S. Ct. 383, 385, 48 L.Ed. 504 (1904). For instance, where exported articles were delivered to the carrier and title passed, the Supreme Court found those articles had entered the process of exportation. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 68-70, 43 S. Ct. 485, 485-86, 67 L.Ed. 865 (1923). Thus, taxing such articles would have been unconstitutional. Although other actions may have been necessary before the goods would have been in transit, "so long as [these actions] were only the regular steps" taken to export such goods, the effect of the sale was to start the goods upon their voyage abroad. *See id.* at 69-70, 43 S.Ct. at 486.

Constitutional freedom from the taxation of exports involves more than mere exemption from taxes laid directly upon the articles exported. In *Fairbank*, the Court held that a stamp tax imposed on a foreign bill of lading was equivalent to a tax upon the articles listed, and therefore contrary to the Export Clause. 181 U.S. at 312, 21 S. Ct. at 660. The Court noted exports almost always require bills of lading. *See id.* at 294, 21 S. Ct. at 652 (citing *Almy v. California*, 65 U.S. (24 How.) 169, 174, 16 L.Ed. 644 (1861)) (noting necessities of foreign commerce always require association with bill of lading or similar written instrument). By placing a tax on the bill of lading, the Court reasoned, Congress had violated the letter and

spirit of the Export Clause. *See id.* at 290-291, 300, 312, 21 S.Ct. at 651-652, 655, 660.

Similarly, in *Thames & Mersey Marine Insurance Co. v. United States*, 237 U.S. 19, 35 S.Ct. 496, 59 L.Ed. 821 (1915), the Supreme Court found a tax upon policies of marine insurance on exports prohibited by the Constitution. In reaching its determination, the Court inquired whether the tax imposed was so directly and closely related to the process of exportation that the tax was in substance a tax upon the exports themselves. *Id.* at 25, 35 S.Ct. at 498. The Court found its answer within the dynamics of trade and commerce: where commerce requires an item for exportation—such as a written instrument necessarily and always associated with the export of articles of commerce—taxation of that item serves as taxation of the exported article. *Id.* at 26-27, 35 S. Ct. at 498-99. This prohibition of the Export Clause also has been applied to taxes upon charter parties, contracts for the carriage of full cargo lots, *United States v. Hvoslef*, 237 U.S. 1, 16-17, 35 S.Ct. 459, 464, 59 L.Ed. 813 (1915) and, more recently, to excise taxes on premiums paid to foreign insurers, *IBM*, 13 Fed. Cir. (T) ——, 59 F.3d 1234.

Here, Congress imposed the Tax directly upon exports well along the stream of exportation. The Tax is assessed at the time of loading the cargo. 26 U.S.C. § 4461(c)(2). As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, *see A.G. Spalding*, 262 U.S. at 68-70, 43 S. Ct. at 485-86, a tax imposed on the further step of loading such cargo onto the vessel also falls within the prohibition of the Clause.

The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo, or upon any instruments of commerce that accompany the goods. Further, an *ad valorem* tax is levied in direct proportion to an article's value. Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported.

Accordingly, the court concludes the Tax is prohibited by the Export Clause and it need not address *amici's* (claimants in other cases) contentions pertaining to whether the Tax also violates the Due Process Clause or the Port Preference Clause of the Constitution.

IV

As indicated, the parties agree that this court has subject matter jurisdiction, *see supra* p. 410, but disagree as to the specific basis upon which exporters may make claims. Two subsections of the court's jurisdictional statute may provide the parties a route for judicial review. *See* 28 U.S.C. § 1581(a), (i) (1988 & Supp. V 1993). Subsection 1581(a) provides for review of a denial by the Customs Service of a protest of certain duties, charges, exactions, or drawbacks. 28 U.S.C. § 1581(a); 19 U.S.C. § 1515 (1988 & Supp. V 1993). A party must protest a Customs decision within 90 days of the date of the decision to be protested. 19 U.S.C. § 1514(c)(3)(B) (Supp. V 1993). On the other hand, subsection 1581(i) gives the court broad residual authority over civil actions arising out of federal statutes governing import transactions. *Conoco*, 12 Fed. Cir. (T) at ——, 18 F.3d at 1586. Subsection 2636(i) of the same title requires a party

to commence an action under subsection 1581(i) "within two years after the cause of action first accrues." 28 U.S.C. § 2636(i) (Supp. V 1993). The court's decision as to the appropriate jurisdictional basis relates to the amount of plaintiff's recovery.

A.

Defendant argues jurisdiction is only proper under subsection 1581(a). According to defendant, the court may review challenges to the constitutionality of the Tax only where an exporter properly protests its payment, and seeks review of the denial of that protest. Although defendant concedes that "neither jurisdictional provision may fit exactly," (Tr. of Oral Argument at 24 (June 27, 1995)) [hereinafter "Tr."], defendant contends permitting this case to rest upon any other jurisdictional ground would greatly expand the government's liability and would disregard the only congressionally- mandated avenue to challenge the Tax.

According to defendant, Congress intended this Court to entertain a tax challenge only after an exporter had protested its payment of the tax. Defendant garners support for this interpretation from the statutory language directing the court to treat the tax as a customs duty for the purpose of jurisdiction. If the court properly is to treat the tax as a customs duty, defendant contends, the protest procedures under subsection 1581(a) must govern.

Further, defendant argues, there is a Customs decision for the parties to protest—Customs' decision to accept payment. (Tr. at 25.) Defendant contends administration of the Tax is not merely ministerial, because subsection 4462(i), title 26, United States

Code authorizes Customs, through the Department of the Treasury, with administering the assessment of the Tax. Defendant claims Congress has delegated substantial authority to the Secretary of the Treasury (1) to determine the method of payment and collection of the Tax; (2) to exempt certain transactions from the Tax where collection would be impracticable; and (3) to provide for mitigation of penalties and the settlement of claims. Defendant claims this grant of power gives the Secretary of the Treasury "near plenary authority to 'carry out the purposes' of the Act." (Def.'s Mem. in Opp'n to *Amici* at 34.) Accordingly, defendant contends, Customs' power to administer the Tax transcends a ministerial role.

Defendant cites a number of authorities in support of its position. In *Norfolk & Western Railway Co. v. United States*, 18 CIT ___, 843 F. Supp. 728 (1994), defendant asserts the court found the assessment of a user fee similar to the Tax constituted a protestable decision, and the period for filing the protest began when Customs decided the plaintiff would have had to pay the fee. In *General Motors Corp. v. United States*, 10 CIT 569, 643 F. Supp. 1139 (1986), defendant contends the court held administrative procedures, where available, had to be exhausted even before Customs issued its decision. According to the defendant, although the court found the obligation to pay the charges was derived from statute, payment of the duties was pursuant to section 1514, and therefore protestable. The fact that Customs took no affirmative action to collect the duties but only accepted or rejected certain offers, defendant argues, did not alleviate the need for protest.

These arguments are unpersuasive. Section 1581(a) permits review of protest denials by Customs for only certain final decisions enumerated in 19 U.S.C. § 1514(a). *See* 28 U.S.C. § 1581(a); 19 U.S.C. § 1515. For a party to be able to protest and obtain jurisdiction pursuant to section 1581(a), Customs first must have made a decision. *See* 19 U.S.C. § 1514(a), (c) (1988 & Supp. V 1993) (noting Customs decisions are final unless protested and that such protests must "set forth distinctly and specifically" each decision protested).

Acceptance of payment of duties owed does not constitute a protestable decision. *See Dart Export Corp. v. United States*, 43 CCPA 64, 74, C.A.D. 610, 1956 WL 8339 (holding Customs' acceptance of estimated duties tendered did not constitute decision), *cert. denied*, 352 U.S. 824, 77 S.Ct. 33, 1 L.Ed.2d 48 (1956); *Best Foods, Inc. v. United States*, 37 Cust. Ct. 1, 9-10, 147 F. Supp. 749, 756-57 (1956) (holding payment of customs duties at time of entry not decision for purpose of computing time to file protest). Customs plays little role in accepting the payments; rather, they arrive at a "postal rental box serviced by a commercial bank that processes [Harbor Maintenance Fund] payments and deposits them to the United States Treasury." United States General Accounting Office, *U.S. Customs Service: Limitations in Collecting Harbor Maintenance Fees*, GAO/GGD-92-25, at 5 (Dec. 1991). As recognized by this court in *Carnival*, it would be impossible to protest the Tax as "there was no decision of Customs which [plaintiffs] could protest." 18 CIT at ____, 866 F. Supp. at 1441.

Neither the Harbor Maintenance Tax statute, nor its regulations, require a decision from Customs. As previously noted, the statute imposes a Tax on commercial cargo at loading for exports and unloading for imports. 26 U.S.C. § 4461(c)(2). Liability is an *ad valorem* percentage of the cargo value. 26 U.S.C. § 4461(b) (Supp. V 1993). Value is determined by standard commercial documentation. 26 U.S.C. § 4462(a)(5)(A). Thus Congress, and not Customs, has set the time of imposition and the amount of the Tax. The regulations require exporters to pay port "use fees" on a quarterly basis and mail their payment with a quarterly summary report or cover letter identifying the exporter to Customs' post office box in Chicago. 19 C.F.R. § 24.24(e) (1995). Exporters may request refunds by mailing an amended quarterly summary report with a copy of the quarterly summary report for the quarter(s) in which they request a refund to the Chicago post office box, *id.*, or alternatively by filing with Customs Headquarters through general provisions for claims not otherwise provided for by the regulations, 19 C.F.R. § 24.73 (1995). None of these procedures requires Customs to judge the constitutionality of the Tax, and cannot be considered decisions with respect to payment. These actions are merely ministerial in nature. Although there may be circumstances where Customs might exercise discretion in administering and enforcing the Tax, this discretion does not extend to a determination on the constitutionality of the Tax.

In this case, there are no issues of classification or similar issues which would be part of a protestable decision. In *Mitsubishi Electronics America, Inc. v. United States*, 12 Fed. Cir. (T) ——, ——, 44 F.3d 973,

976 (1994), the Federal Circuit held Customs does not make protestable decisions concerning antidumping duties under 19 U.S.C. § 1514(a). The Court of Appeals emphasized that Customs only performed a ministerial function in collecting such duties under the direction of the Department of Commerce, and Customs did not conduct an investigation, determine rates and margins, or issue antidumping orders. 12 Fed. Cir. (T) at ——, 44 F.3d at 977. Plaintiff and amici do not argue that they have overpaid the amount of the Tax; rather, their challenge goes to the heart of the constitutionality of the statute itself, a matter outside of Customs' authority. *See generally McCarthy v. Madigan*, 503 U.S. 140, 147-48, 112 S. Ct. 1081, 1087-88, 117 L.Ed.2d 291 (1992) (noting agency may be unable to consider whether relief should be granted, because of lack of institutional competence to resolve issues presented). Similarly, in *United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 201, 544 F. Supp. 883, 887, *aff'd*, 69 CCPA 172, 683 F.2d 399 (1982), in which protest was not required, Customs could not change the scope of the Presidential Proclamation as to over-quota sugar. Much like *Mitsubishi* and *Cane Sugar Refiners'*, there is no decision by Customs as to whether it will assess the Tax.

Customs does not determine the application, policies, or rates of the Tax, but merely serves to implement its provisions. As distinguished from *National Corn Growers Ass'n v. Baker*, 6 Fed. Cir. (T) 70, 840 F.2d 1547 (1988), where the policies and rates in question were those of Customs, and "peculiarly within the ambit of the Customs Service to correct," 6 Fed. Cir. (T) at 82, 840 F.2d at 1556,

Customs is powerless to correct the constitutional infirmities raised by plaintiff. *See Califano v. Sanders*, 430 U.S. 99, 109, 97 S.Ct. 980, 986, 51 L.Ed.2d 192 (1977) (finding administrative hearing procedures unsuited to resolving constitutional issues). In short, Customs must simply follow the path enacted by Congress.

Moreover, neither of defendant's proffered cases, *Norfolk* nor *General Motors*, supports its position. The protestable decision in *Norfolk*—an assessment of a user fee—is distinguishable from the present case. In *Norfolk*, the protestable decision was Customs' particular application of a statute. 18 CIT at ——, 843 F. Supp. at 733. Customs' decision was limited to whether a vessel constituted a ferry or a barge, not whether the application of the user fee was constitutional.

General Motors is equally inapposite. The issue concerned whether car radio components imported into the United States as original motor-vehicle equipment were diverted for other uses, and therefore subject to penalty. 10 CIT at 570, 643 F. Supp. at 1139-40. Defendant argues the court found "*payment* [of duties] equated to the protestable event," even though the duty to pay was derived from statute, and not a Customs decision. (Def.'s Br. in Opp'n to *Amici* at 32.) This argument is misplaced. Plaintiff only paid the diversion duties "[o]nce Customs indicated to plaintiff that it considered the merchandise diverted." 10 CIT at 575, 643 F.Supp. at 1143 (emphasis added). Customs made a decision in finding General Motors had diverted the radios. Again, Customs did not consider the constitutionality of the statutory scheme as a whole.

Defendant's own arguments support Customs' inability to make a decision as to the constitutionality of the Tax. Defendant initially argues, "[t]he decision requiring the payment is the law itself, the compulsion to pay is provided by the statute itself. The decision is the decision to accept payment from the exporter." (Tr. at 26.) Defendant subsequently qualifies this statement, noting, "[i]t isn't a decision by Customs to accept and retain the money, it has no authority to return it unless the proper procedures have been followed, which are filing of a protest and a denial of a protest." *Id.* at 59. Such reasoning is circular. For plaintiffs to file a valid protest, Customs must have made a protestable decision. As a decision, according to the defendant, can only be made after the protest is filed, no protestable decision exists.

Finally, certain *amici* contend the denial of a refund request pursuant to 19 C.F.R. § 24.24(e)(5) is a protestable decision, and that subsection 1581(a) would provide the appropriate basis for jurisdiction. Although Customs has discretion to decide whether it is able to refund payments of the Tax, such discretion is limited and does not extend to determinations of constitutionality. As Customs does not have the power to decide the constitutionality of the Tax, the court finds protestable decisions pursuant to the refund provision of subsection 24.24(e)(5) are limited to decisions pertaining to the administration of the Tax, not its constitutionality.

B.

Subsection 1581(i) embraces the issues contested as to the Harbor Maintenance Tax. It provides, in pertinent part,

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> * * * * *;
>
> * * * * *;
>
> (4) administration and enforcement with respect to the matters referred to in paragraph (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581(i). Congress directed the Tax be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within subsection 1581(i)(1).

Congress similarly intended the administration and enforcement of the Tax to be treated as the administration and enforcement of a customs duty. 26 U.S.C. § 4462(f)(1). Thus, jurisdiction lies under subsection 1581(i)(4) as it relates to subsection 1581(i)(1).

In sum, jurisdiction is provided by 28 U.S.C. § 1581(i).

V

The court finds the Harbor Maintenance Tax, as it applies to exports unconstitutional. Plaintiff's motion for summary judgment is granted; defendant's cross-motion for summary judgment is denied. Parties are to submit a proposed judgment in conformity with the opinion within 20 days.

MUSGRAVE, Judge, concurring.

I concur in the opinion that the Harbor Maintenance Revenue Act (the "Act") is unconstitutional as it applies to exports and that the plaintiff U.S. Shoe is entitled to the remedy it requests, namely a refund of export taxes going back two years from the time it filed its complaint. Nevertheless, I offer some additional comments addressing the jurisdictional issue and the prayers of certain amici for a full refund of all taxes illegally collected from them since the implementation of the Act.[1] In my view, the manifestly inadequate administrative protest procedure under 28 U.S.C. § 1581(a) is a further reason that 28 U.S.C. § 1581(i) jurisdiction arises; moreover, com-

[1] *E.g.*, "*Amici* respectfully join in plaintiff's request that this Court find the HMT unconstitutional, strike it down, and direct pursuant to the power granted it under 28 U.S.C. § 1585 that *all HMT payments unlawfully collected be refunded*, together with such other and further relief as may be appropriate." (*Amici* Texaco *et al.*'s Mem. Supp. Summ. J. at 2) (emphasis added).

plainants are entitled to a restitution of all taxes heretofore exacted under the Act in violation of the Export Clause of the United States Constitution.[2] This latter position is compelled by the Fifth Amendment Due Process Clause enjoining the deprivation of "life, liberty, or property, without due process of law."

I

As an initial matter, recent opinions of the Court of Appeals for the Federal Circuit and this Court have ruled unambiguously that a *decision* by the Customs Service ("Customs") is a condition precedent for section 1581(a) jurisdiction to arise. *Mitsubishi Electronics of America, Inc. v. U.S.*, 44 F.3d 973 (Fed. Cir. 1994); *Carnival Cruise Lines v. U.S.*, 18 CIT — —, 866 F. Supp. 1437 (1994). As the Court's opinion makes abundantly clear, there is no *decision* involved in Customs' collection of these unconstitutional taxes because Customs lacks discretion in the performance of its delegated ministerial duties. In addition to this reason, however, there is a further justification for the Court to invoke its section 1581(i) jurisdiction in this case: requiring plaintiffs to pursue a remedy under the protest procedures mandated by section 1581(a) would oblige them to follow a manifestly inadequate and utterly futile procedure.

Certain *amici* argue that a party could presumably request a refund as set forth in 19 C.F.R. §§ 24.24(e)(5) or 24.73, obtain a denial of refund from Customs, and then protest that decision of Customs to deny the refund by way of the administrative

[2] The other jurists on this panel are not in accord with the comments addressing the remedy issue.

protest process prescribed by 19 U.S.C. §§ 1514 and 1515. According to these *amici*, the Court could dismiss as not ripe for adjudication those actions which were filed prior to Customs denying a refund request, but instead should waive exhaustion of administrative remedial procedures and assert jurisdiction under section 1581(i), as such procedures are inadequate for the type of relief sought. (Br. of *Amici Curiae* Aris-Isotoner, *et al.*, at 14-22.) Plaintiff and nearly all amici argue that the available administrative protest remedy set forth in 19 U.S.C. §§ 1514 and 1515 is futile and manifestly inadequate under the circumstances. The ultimate issue presented by such arguments is whether administrative remedies set forth by statute and regulations are appropriate when a party seeks a refund of payments mandated by an act of Congress by challenging such act as unconstitutional.

The administrative remedial procedure as it applies to refund requests is clearly not meaningful or adequate under the given circumstances. *See generally McCarthy v. Madigan*, 503 U.S. 140, 144-149, 112 S. Ct. 1081, 1085- 89, 117 L.Ed.2d 291 (1992) (explaining circumstances in which administrative remedies need not be exhausted); and *Conoco v. Foreign Trade Zones Board*, 18 F.3d 1581 (Fed. Cir. 1994) (holding section 1581(a) jurisdiction inappropriate where it is futile or manifestly inadequate). Most importantly, as the Court's opinion makes clear, Customs does not have authority to refund Tax payments or otherwise grant effective relief for constitutional claims. It is well settled that an administrative agency lacks the authority to declare an act of Congress unconstitutional. *See Califano v. Sanders*, 430 U.S. 99, 109, 97

S. Ct. 980, 986, 51 L.Ed.2d 192 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). Hence, under the circumstances of this case Customs is compelled to deny any administrative refund claim, making a request for refund a futile act.

Moreover, Customs has predetermined the issue before it. As plaintiff points out, Customs' denial of protests challenging the constitutionality of the Harbor Maintenance Tax (26 U.S.C. §§ 4461 and 4462, hereinafter the "Tax") is a foregone conclusion. (Pl.'s Mem. Supp. Summ. J. at 15-16.) Customs routinely denies all of the protests it receives in connection with Tax payments. The denial is a form letter simply asserting in one sentence that the levy is not an unconstitutional tax but a statutorily mandated user fee.[3] Such routine denial demonstrates that filing refund requests with Customs on grounds of unconstitutionality is clearly a futile act.

Lastly, requiring a party to file for refunds may unduly prejudice that party. "[P]rejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action." *McCarthy*, 503 U.S. at 147, 112 S.Ct. at 1087. The administrative refund processes set forth under 19 C.F.R. §§ 24.24(e)(5) and 24.73 do not provide a time frame for the resolution of a claim for refund. This Court has recently deemed it appropriate to waive exhaustion

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[3] Declaration of Charles Davies, Director—User Fee Task Force, Headquarters Office of Inspection and Control at 6, and attachments.

of administrative remedies because they were not clearly delineated and because they set up indefinite timetables. *B-West Imports v. United States*, 19 CIT ——, 880 F. Supp. 853 (1995). The administrative refund procedures are similarly indefinite and are therefore inadequate under the circumstances of the present case.

Before this Court may exercise jurisdiction over this matter by way of section 1581(i), there must be terms within the language of that section which cover the issues plaintiff brings before the Court. *Conoco*, 18 F.3d at 1588-89. Defendant argues that section 1581(i) by its own terms fails to provide a jurisdictional basis for a constitutional challenge to the Tax because plaintiff's claims are based upon payments associated with exports, while the express terms of subsections 1581(i)(1) and (2) apply only to imports. (Defs. Mem. Supp. Summ. J. at 24.)

The terms of section 1581(i) make clear that the Court has jurisdiction over any civil action that arises out of any United States law providing for the matters set forth in the statute. Defendant's reading of section 1581(i) would eliminate that all-encompassing term and in effect grant the Court jurisdiction only over the specific matters set forth in subsections 1581(i)(1)-(4), but not the laws dealing with those matters. Such an interpretation would mean that this Court would have jurisdiction over the Tax as it applies to imports, the district courts would have jurisdiction over the Tax as it applies to exports, and it is uncertain as to which court would have jurisdiction over the Tax as it applies to, *e.g.*, passenger services.

As the opinion of the Court points out, Congress did not intend for the district courts to exercise jurisdiction over the Tax. The statutory language of 26 U.S.C. § 4462(f)(2) and its accompanying legislative history indicate Congress' clearly stated intention that this Court have jurisdiction over the Tax. Furthermore, "[S]ection 1581(i) was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal *statutes* governing import transactions and to eliminate the confusion over whether jurisdiction lay in the Court of International Trade or the district courts." *Conoco*, 18 F.3d at 1588 (emphasis added). Thus it was the intent of Congress for this Court to exercise jurisdiction over the entire Tax, not just those portions of the Tax that are covered under the specific subsections 1581(i)(1)-(4).

The terms of section 1581(i) embrace the Tax. This Court has found that the Tax is a law which provides for revenues from imports and exports, and for the administration and enforcement with respect to those revenues including the protest process. Therefore, subsections 1581(i)(1) and (4) provide this Court with jurisdiction over the Tax.

In sum, Customs has not made a decision with respect to the Tax upon which a valid or meaningful protest may be predicated. Defendant's arguments simply ignore that necessary prerequisite to the protest process set forth under 19 U.S.C. §§ 1514 and 1515. Moreover, under the circumstances of this case, it is futile and manifestly inadequate to await a decision by Customs with respect to an administrative refund request. As required, the terms of section 1581(i) cover the issues that plaintiff brings before

the Court. The Court's jurisdiction is therefore properly asserted over this matter by way of section 1581(i). The Court is authorized by statute to exercise discretion in requiring exhaustion of administrative remedies. 28 U.S.C. § 2637(d). Having found jurisdiction under section 1581(i), pursuant to this Court's discretionary powers under 28 U.S.C. § 2637(d), and for the reasons previously discussed, it is inappropriate to require exhaustion of any administrative remedy when, as in this case, a party requests a refund by challenging the constitutionality of an act under which payment was made.

II

It is the duty of this Court to exercise judicial review over Congressional acts within its jurisdiction, and "[s]hould Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution . . . it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423, 4 L.Ed. 579 (1819). As the opinion of the Court details, there is no question that the Act violates the Export Clause. Insofar as the Act therefore is not the law of the land, it is void *ab initio*: "an invalid exercise of the power of Congress . . . [is] as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity. . . ." *Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 566, 33 S.Ct. 581, 584, 57 L.Ed. 966 (1913). When the invalid act is the federal government's unconstitutional exaction of taxes, taxpayers' rights under the Due Process Clause of the Fifth Amendment are implicated. "Thus, if a

plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy." *Reynoldsville Casket Co. v. Hyde*, ___ U.S. ____, ____, 115 S.Ct. 1745, 1752, 131 L.Ed.2d 820 (1995) (Scalia, J., concurring).

A tax refund is the only appropriate remedy for the government's illegal collection of revenue under the Act. Because the tax violates the Export Clause, it was "beyond the [government's] power to impose, . . . [and the government has] no choice but to undo the unlawful deprivation by refunding the tax previously paid under duress, because allowing the [government] to collect these taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the [Due Process Clause]." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 39, 110 S. Ct. 2238, 2251, 110 L.Ed.2d 17 (1990). Yet an attempt to collect all moneys illegally exacted since the tax's incipience in 1987 ostensibly conflicts with the two-year statute of limitations applicable generally to claims brought under 28 U.S.C. § 1581(i). Due to the peculiar circumstances of this case, however, enforcing the statute of limitations would impermissibly infringe constitutional rights guaranteed under the Fifth Amendment Due Process Clause.

The United States Supreme Court has held that "[a] constitutional claim can become time-barred just as any other claim can. . . . Nothing in the Constitution requires otherwise." *Block v. North Dakota*, 461 U.S. 273, 292, 103 S.Ct. 1811, 1822, 75 L.Ed.2d 840

(1983). While valid claims based upon unconstitutional acts by the federal government may at some time become stale or deemed waived, an attempt, as here, at interposing a very short statute of limitations runs afoul of due process and flaunts the sovereign's role as, among other things, protector of rights of its citizens, from whom *this* government, almost uniquely when it was created, acquired all of its powers. And here, the legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act; this being true, enforcing the foreshortened statute of limitations is to reward the perpetration of an overtly unconstitutional action.

The Bill of Rights incorporates those indefeasible rights which the citizens decline to surrender to the sovereign, and it is this very feature of our constitutional democracy—that the government is empowered only to the extent that citizens surrender their rights—which distinguishes it from other political systems in which people derive their rights only from the state. Although the federal government enjoys broad immunity, this immunity does not extend to unconstitutional behavior, and a statute of limitations that operates in violation of the Due Process Clause constitutes an invalid exercise of the power of Congress which does not immunize the government from suit.[4]

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[4] *See* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1427 (1987) ("[W]henever a government entity transgresses the limits of its delegation [of powers] by acting *ultra vires*, it ceases to act in the name of the sovereign, and surrenders any derivative "sovereign" immunity it might otherwise possess.").

[T]he exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.[5]

Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948). "[T]o hold otherwise would be to create the possibility that Congress could act unconstitutionally and then attempt to shield its action from review by virtue of sovereign immunity." *Bartlett v. Bowen*, 816 F.2d 695, 708 (D.C. Cir. 1987). Thus, it is to no avail that the interlocutor points to the jurisdictional nature of the statute of limitations presently under consideration. Moreover, "The courts . . . have recognized a principle that the constitutional guarantee of an independent judiciary limits the legislature in the exercise of its power to regulate court jurisdiction." *Bartlett*, 816 F.2d at 705. The judicial branch must not countenance the disenfranchisement of democratic constitutional rights in deference to the royal cloak of sovereign immunity. To do so would be to abrogate the judi-

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[5] *See also International Tel. & Tel. Corp. v. Alexander*, 396 F. Supp. 1150, 1163 n. 31 (D. Del. 1975) (discussing federal tax protest and remedy statutes and declaring, "As previously noted, both statutes are jurisdictional and are within the power of Congress to enact pursuant either to Art. III, § 1 of the Constitution or the sovereign immunity of the federal government. . . . These respective sources of power, however, cannot be utilized by Congress to shield from judicial review governmental action violative of constitutional guarantees.").

ciary's proper role as protector and final arbiter of constitutional rights, a role implicit in the separation of powers established by our constitutional scheme and made decisively explicit in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

The Supreme Court has recognized that procedural requirements in tax refund cases must satisfy all the provisions of the Constitution. Discussing procedural obstacles which might bar a refund of state taxes collected in violation of the Constitution, the Court declared, "*Depending upon whether or not this independent rule satisfied other provisions of the Constitution*, it could independently bar the taxpayers' refund claim." *Hyde*, ____ U.S. at ____, 115 S. Ct. at 1750 (emphasis added). In this vein the Court has indicated that states may enforce "relatively short statutes of limitation applicable to such actions." *McKesson*, 496 U.S. at 45, 110 S. Ct. at 2254 (citing Florida's three-year statute of limitations for tax refund suits). Although states may promulgate statutes of limitations in connection with tax refund statutes, they are bound to provide substantive relief for revenue exacted in violation of the Constitution. A state's post-deprivation tax refund regime must afford "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40, 110 S. Ct. at 2252 (quoting *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285, 32 S. Ct. 216, 217, 56 L.Ed. 436 (1912)). Moreover, when a state places

> a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide *meaningful backward-looking relief to rectify any unconstitutional deprivation.*

Id. at 31, 110 S. Ct. at 2247 (emphasis added).

In tax refund cases the Fifth Amendment Due Process Clause does not endow the federal government with the flexibility the states enjoy when fashioning schemes to redress unconstitutional exactions. The relevant state obligations under the Fourteenth Amendment Due Process Clause owe their flexible nature to principles of federalism and comity:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration. . . . [T]his Court [has repeatedly] shown an aversion to federal interference with state tax administration. . . . The reluctance to interfere in state tax collection continued in *McKesson*, in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation.

National Private Truck Council v. Oklahoma Tax Comm'n, ___ U.S. ____, ____, 115 S. Ct. 2351, 2354, 132 L.Ed.2d 509 (1995) (citation omitted). In the instant case, there exists no question of "comity" between the federal government and a state, and under *Mc-*

Kesson and its progeny, a two-year statute of limitations in tax refund cases may well be unconstitutional at the state level. Although there is no precedent directly on point, it is evident that in this case, the more stringent due process obligations incumbent on the federal government entail that enforcing the two-year statute of limitations would infringe Fifth Amendment rights by, *inter alia*, failing "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."

There is no need to speculate on a constitutionally permissible term for a statute of limitations in this type of case. Having found the statute of limitations inapplicable, it is my opinion that the imperatives of due process require a full refund back to the date of the Act's implementation, *i.e.*, 1987 (the bulk of unconstitutional exactions appear to have occurred subsequent to the increase of the tax from .04% to .125%, in 1991). Although the government has a legitimate interest in orderly and predictable tax administration, Justice O'Connor explained that "*McKesson* makes plain that equitable considerations are of limited significance once a constitutional violation is found." *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 184, 110 S.Ct. 2323, 2334, 110 L.Ed.2d 148 (1990). Any misplaced concern for visiting hardship upon the government by requiring a complete refund of the unconstitutionally exacted taxes is dispelled by the fact that at the end of fiscal year 1994, the fund generated by the Act contained a $453 million *surplus*,[6] while the total sums collected

[6] Dept. of the Treasury, Financial Management Service, Funds Account Branch, Harbor Maintenance Trust Fund Income Statement and Balance Sheet, 10/1/93-9/30/94.

since the Act's inception amounted to $2.7 billion, $700 million of which was derived from unconstitutional export taxes. (Def's. Mem. Supp. Summ. J. at 5). Furthermore, the fund's cumulative surplus is expected to balloon to nearly $1.7 billion by the end of fiscal year 1999.[7] Under the circumstances, restitution of all unconstitutional exactions collected since the Act's implementation is appropriate where such relief is requested.

[7] Army Corps of Engineers Internal Briefing Outline (Feb. 2, 1995).